United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1154

To be argued by
JOHN S. SIFFERT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1154

UNITED STATES OF AMERICA,

Appellee,

—v.—

HOWARD FINKELSTEIN, a/k/a ROBERT HOWARD, ANTHONY SCARDINO, ALAN SEGAL, and EDWARD ZUBER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Howard Finkelstein, a/k/a Robert Howard, Anthony Scardino, Alan Segal, and Edward Zuber appeal from judgments of conviction entered on March 31, 1975, in the United States District Court for the Southern District of New York, after a nine day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 74 Cr. 908, filed September 24, 1974, charged forty-six counts of conspiracy and substantive violations involving sale of unregistered stock, securities fraud and mail fraud. The Indictment named Burney Acton, Joseph Azzerone, Michael Clegg, Howard Finkelstein, a/k/a Robert

Howard, Jack Levine, Richard McKibbon, Anthony Scardino, Alan Segal and Edward Zuber as defendants and George Aaron, William Casey, Leonard Close, Michael Gardner, Michael Karfunkel, Sheldon Lamb, Eddie Levine, Don Ross, Stuart Schiffman and Don Shepherd as unindicted co-conspirators. Count One charged all defendants with conspiracy to violate the federal securities laws and to commit mail fraud in connection with the reaccumulation and distribution of stock in Pioneer Development Corporation ("Pioneer"), an old shell corporation without substantial assets, in violation of 18 U.S.C. § 371. Count Two charged Segal, Acton and Clegg with the interstate transportation of 111,000 shares of Pioneer stock, no registration statement being in effect as to such stock (15 U.S.C. §§ 77e(a)(2) and 77x, 18 U.S.C. § 2). Count Four charged Segal with interstate transportation of an additional block of 20,000 shares of unregistered Pioneer stock (15 U.S.C. §§ 77e(a)(2), 77x, 18 U.S.C. § 2). Counts Five through Ten charged Segal with the sale of unregistered Pioneer stock by use of interstate communication (15 U.S.C. §§ 77e(a)(1), 77x, 18 U.S.C. § 2). Counts Eleven through Fourteen and Sixteen charged Scardino and McKibbon with use of interstate wires to sell unregistered stock; Count Fifteen charged Acton and Clegg with the same offense (15 U.S.C. §§ 77e(a)(1), 77x, 18 U.S.C. § 2). Counts Seventeen through Twenty-nine charged all defendants with fraud in the offer and sale of securities (15 U.S.C. §§ 77q, 77x, 18 U.S.C. § 2. Counts Thirty through Forty-six charged all defendants with mail fraud (18 U.S.C. §§ 1341, 2).

The trial as to Segal, Scardino, Zuber, Finkelstein and Jack Levine commenced on December 2, 1974.* At the close of the Government's case, the Government consented to abandon Counts 15, 20, 24, 25, 26, 27, 31, 35, 36, 38, 42 and 46 (JA 1114-15). The Court entered a directed verdict

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* As to the remaining defendants, Acton and Clegg each pleaded guilty to Counts One and Two, Azzerone pleaded guilty to Count One, and McKibbon was a fugitive.

as to Levine (JA 1133-37). On December 12 the jury returned its verdict convicting Segal on all remaining counts with which he was charged (Counts 1-3, 5-10, 17-19, 21-23, 28-30, 32-34, 37, 39-41, 43-45). The jury convicted Scardino on ten counts, including conspiracy (Count 1), interstate transportation of unregistered stock (Count 4), sale of unregistered stock (Counts 30, 32, 37), while acquitting Scardino on Counts 17-19, 21-23, 28, 29, 33-34, 39-41, 43-45. The jury convicted Zuber on Count 29 (securities fraud) and Finkelstein on Counts 29 and 44 (securities fraud and mail fraud), while acquitting them on all remaining counts with which they were charged.

On March 31, 1975, Judge MacMahon sentenced Segal to concurrent terms of three years imprisonment on each count; Scardino to concurrent terms of two years imprisonment on each count, with Scardino incarcerated for two months, execution of the remainder to be suspended with Scardino placed on probation for twenty-two months; Zuber to two years and six months imprisonment on Count 29; and Finkelstein to concurrent terms of two years imprisonment on Counts 29 and 44. Appellants are on bail pending this appeal.*

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* Zuber was released on bail pending the instant appeal, but is presently incarcerated at the Federal Correctional Institution in Terminal Island, California on the basis of convictions on Indictment Cr. 74-2277 in the Southern District of California and Indictment Cr. 75-203 in the District of Nevada for which Zuber received five year sentences to run concurrently with each other and with the sentence imposed in the instant case.

Statement of Facts

A. Synopsis

The Government's evidence, presented through the testimony of thiry-two witnesses and approximately three hundred and thirty-five exhibits, established that from early 1969 through March, 1970 Segal, Scardino, Acton, Clegg and Azzerone devised and carried out a fraudulent scheme to accumulate and distribute hundreds of thousands of shares of worthless stock in a shell corporation to unsuspecting buyers who did not even have the opportunity to examine a prospectus or registration statement about the corporation or its purported assets, successfully swindling the public out of nearly a third of a million dollars.

In early 1969 Acton and Clegg accumulated a controlling portion of the outstanding stock of Pioneer, a pre-1933 shell corporation, with a view to distributing the stock to the public.

Late that summer, through Scardino, Acton and Clegg met Segal, a New York promoter, who agreed to "trade" the stock and boost its price upward. Segal agreed to remit $500,000 of the proceeds of the stock transactions to Acton and Clegg for the purpose of operating a mercury mine which Acton and Clegg were to acquire.

In the fall, Segal transported 111,500 shares of the accumulated stock to New York and opened, through Azzerone, a broker at Karen & Co., a market in Pioneer at $5 to $6 per share. Segal arranged to trade Pioneer stock at Karen & Co. through a nominee, Francine Zahl, Segal's secretary. By means of directed trades through Karen and others, touting the stock, and false statements of Pioneer's assets, Segal manipulated the price of Pioneer stock upward until it reached $9 per share.

As part of the scheme to manipulate the stock, Acton and Clegg agreed not to sell the remaining accumulated shares of Pioneer in their possession without Segal's approval. But, as the selling of Pioneer continued in the East, Segal remitted none of the proceeds to Acton and Clegg to assist operating the mine. Acton turned to Scardino to arrange a loan using Pioneer stock as collateral. Scardino, in turn, with his business associate, McKibbon, rather than obtain a loan, sold the Pioneer stock. Scardino forwarded some of the funds to Acton, representing them to be proceeds of the loan, while retaining in excess of $14,000 for himself. McKibbon also kept a portion of the proceeds.

When the shares of Pioneer that had been sold in the West began to reach the Eastern market, Segal sent out Zuber and Finkelstein to enforce the conspiratorial agreement not to sell stock without Segal's permission. Zuber, armed with a gun, abducted Acton and took him to a "sit down" meeting in Reno, with McKibbon, Finkelstein and Scardino. Under physical coercion, McKibbon confessed to having sold the stock. Scardino then agreed to pay back his share of the proceeds to Segal.

When Zuber and Finkelstein returned to New York, they became interested in benefitting from the scheme and procured several fur coats in exchange for the worthless stock. Finkelstein further entered a direct sale of the stock with Michael Karfunkel.

B. The Government's Case

1. Acton and Clegg Form Pioneer

In early 1969, following a series of meetings, Burney Acton and Michael Clegg became interested in, and with the assistance of others, commenced efforts to obtain control of the outstanding shares in Pioneer Development Corporation, a dormant shell corporation whose stock was originally issued prior to the passage of the 1933 Securities Act (JA 202-06).* Throughout 1969, Acton and Clegg accumulated 208,950 shares of the total 515,400 outstanding shares of Pioneer stock. (JA 209, 212, GX 147)** As of July 31, 1969, Acton and Clegg had accumulated sufficient shares to control Pioneer (JA 213). At that time the only assets of Pioneer were a claim in the amount of $35,000 against American Aluminum & Steel, on which Pioneer never collected nor sued, an oral option to purchase a mine in Nevada and an option to purchase a company called Precise Power (JA 213, 541-42). Pioneer did eventually acquire a Nevada mercury mine called the Lone Tree Mining Company, but not until weeks after trading had commenced in Pioneer stock (JA 241, 277). The Lone Tree Mine was never put into commercial operation, nor was any money from the sale of stock ever placed into Pioneer for the purpose of operating the mine (JA 278, 601).

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* All references to "JA" are to the page of the transcript at proceedingss in the District Court as appearing in the Joint Appendix.

** All references to "GX" are to Government Exhibits in evidence some of which are not included in the Joint Appendix. These exhibits are available to the Court upon request.

2. Scardino Introduces Segal

After Acton and Clegg had accumulated the bulk of the 208,950 shares of Pioneer, they had a conversation in late summer 1969 with Anthony Scardino at the Riverside Hotel in which they explained their interest in starting trading in Pioneer stock (JA 216, 558). Scardino told Clegg of "a partner in the Riverside Hotel who was very adept at that [stock trading] and he [Scardino] suggested that he [Clegg] get into contact with Mr. Segal. . . . Mr. Scardino said that Al Segal was one of the best in the country at selling or whatever, trading stock, and that he had a great deal of money himself and would probably be able to help the mining operation and so forth if he liked the deal" (JA 558-60; see also JA 216).

3. The Conspiracy Begins

A short while later, Scardino arranged for Acton and Clegg to meet Segal in Dallas (JA 216-17). Present at the Dallas meeting were Segal, Scardino, Acton and Clegg (JA 217). At that meeting Clegg told Segal that "the majority of outstanding stock to our knowledge had been brought in" (JA 546). Clegg gave Segal documentation on the mine and Precise Power and told Segal "that we needed someone of his background and experience to open the stock up and be, to my understanding, like an underwriter for it" (*Id.*). Segal was told $500,000 was needed to put the mine in operation (JA 221). Segal explained that "he was experienced in this type of operation. He had given me the example of one company, which was Acme, which sounded similar to our situation, and that he had been successful with that company . . . he had taken a fledgling type company--and had been successful in bringing the stock up to a relatively high price and that the people there if they had listened to him and done what he had told them, it would have remained at a good price. Instead, they didn't follow his instructions and it went down to nothing" (JA

547). Segal told Clegg and Acton in Scardino's presence that "he would take this stock, he would determine how much it would open for, however he did this, and that he would support the stock to make sure it did not decline in value" (JA 548).

At this conference Segal promised Acton and Clegg to provide the $500,000 operating capital necessary to open the mine by trading half of the accumulated stock in New York but stated that the remaining stock held by those in the West "was not to be sold at any time without his permission . . . it was not to hit the open market" (JA 548-49).

In late September or early October, 1969 there was a second meeting attended by Segal, Acton and Clegg at the Century Plaza Hotel in Los Angeles (JA 222-23, 550-51, 421-23). Present were Acton, Clegg, Jay Walker, Segal, and Stuart Schiffman, Segal's lawyer (JA 223). Segal again instructed Acton and Clegg that he would open the market in Pioneer provided they give him "approximately half of the stock that we had. The stock we kept we couldn't sell or let go on the market" (JA 226; see also JA 551). Segal explained that "he had to keep the shoe box to be able to keep the price of the stock where he needed it or wanted it" (JA 552). In exchange Segal promised to "get us [Acton and Clegg] all the money we needed for the mining property and for other things, including all the expense money Pioneer needed" (JA 225). While there was some discussion at that meeting of possible acquisitions by Pioneer, Stuart Schiffman, Segal's attorney, pointed out that there was "no actual proof of the value of any of the assets that [Pioneer] owned nor of the ones that they intended to acquire" (JA 426-27).

A third meeting between Segal, Acton and Clegg took place at the Riverside Hotel on October 23, 1969 (JA 228, 423, 560-61). Also present was Sheldon Lamb, a rancher

and owner of mining properties in Nevada (JA 229, 231-32) and Ted Frazier, Hayes Shaeffer and Duane Knigge for the transfer agent (JA 562). At that meeting 56,550 * shares of stock were given to Segal to take to New York (GX 1A; JA 231, 564) for the purpose of opening trading in Pioneer stock at $5.00 a share (JA 252). Segal promised to repay the individuals in whose name the stock was issued, but he never did (GX 1A; JA 565).** Segal further instructed Acton and Clegg to tell any former or present stockholders of Pioneer "if it would be in any way in our power, . . . not to sell the stock, except through Mr. Segal" (JA 564). Segal represented that "he would make the market go up . . . and create more money" (JA 252). When Sheldon Lamb insisted that he be given $20,000 as operating capital before putting the mine into Pioneer, Segal wrote him a check in that amount to cover operating capital (JA 565-66; see JA 222-23). That check later was returned for insufficient funds and was never made good by Segal (JA 238, 445-46, 583-84). At this third meeting Sheldon Lamb gave Segal two feasibility studies on the mine in Dixie Valley which Pioneer was considering acquiring (JA 231-32; GX 6A, 6B; See JA 428).

Through this agreement not to sell stock in the West without Segal's permission, Segal was able to limit the volume and direct the flow of trading so as to manipulate upward the bid and asked prices of Pioneer stock until they reached inflated proportions. As detailed below, Segal in fact did direct large numbers of trades, in some cases even selling to himself. By means of these manipulative and deceptive devices, Segal was able to create the illusion of

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* Of these 56,550, 26,550 shares were purchased from three individuals, Herb Kaighan, Ermanno Mariot and Delores Morgan. The remaining 30,000 shares were issued in the name of Francine Zolt, which was a typographical error and later correctly reissued in the name of Francine Zahl (JA 231; GX 1A).

** Clegg ultimately reimbursed them on his own (JA 565).

market activity and a false value of Pioneer's unregistered stock in the eyes of the deceived public.*

4. Pioneer Remains a Dormant Shell Even As the Stock is Traded

On October 29, 1969 Acton and Clegg acquired Precise Power in exchange for 600,000 shares of restricted Pioneer stock (JA234-36; GX 5A, 5B; JA 568, 570). The testimony established that while Precise Power owned certain patents, it never produced any revenues (JA 237). Indeed the minutes of Pioneer's divestiture of Precise Power indicate that Precise Power's assets were less than $5,000 (GX 12).

The Government's proof was that as early as October 30, 1969 Segal had commenced selling Pioneer stock in New York through the account of a nominee, Francine Zahl, Segal's Secretary, at Karen & Co. at prices ranging from 5¾ to 8½ per share (JA 431, 694; GX 101). At that time Pioneer had no assets except Precise Power, which was producing no revenues, and the unexercised options to buy mining properties previously mentioned. Pioneer itself was producing no revenues and had acquired no mining properties. None of the sales of Pioneer stock was the result of mining activity (JA 278). It was not until December 3, 1969 that the conspirators finally acquired the Lone Tree Mining Co., a dormant mercury mine, in exchange for worthless Pioneer stock (JA 276-77, GX 9). Indeed, the Lone Tree Mining Co. was not even formed until November 20, 1969, several weeks after trading in Pioneer had commenced (GX 7). Even following the acquisition of the mine, there were no revenues nor commercial sales as a result of any mining operations there, and the mine was never even placed in commercial production (JA 278).

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* It was uncontested that no registration statement was ever filed with the SEC in connection with the sale of Pioneer stock (GX 15).

In late December the conspirators transferred 200,000 shares of restricted Pioneer stock to purchase debentures in a company called Pioneer Casualty Insurance Co. in an effort to raise money by pledging the debentures (JA 280, 941-44). Despite their repeated attempts, Acton and Clegg were unsuccessful in obtaining a loan from any banks on the basis of these debentures (JA 280-81, 590).

In the spring of 1975, Pioneer Development Corporation itself became defunct. The minutes of Pioneer reflect that on March 14, 1970 Pioneer was sold to one group of individuals, while the mining interests went to another group (GX 12).

5. Segal's Selling Activities

Despite Schiffman's initial caution to Segal of the need for further proof of assets of Pioneer before investing in the company (JA 426) and without any basis other than Segal's arbitrary selection of price (JA 1081), trading in Pioneer stock was commenced at $5 to $6 per share (JA 430). Schiffman assured Joseph Azzerone, President of Karen & Co., a brokerage firm, that if Karen & Co. were to buy a lot of Pioneer stock, there would be buyers for it and that there would be stock available to fill a short position (JA 430-31, 510). With the assurance of a profit of one-quarter or one-half point on each sale or purchase made for the Zahl nominee account, Azzerone commenced trading in October 1969 (JA 509, 513, 515). At the end of each day's trading he telephoned Francine Zahl, Segal's secretary and nominee, and Schiffman to report the number of shares bought and sold that day (JA 516-18). During these conversations, Azzerone was told the price to start trading in Pioneer the next day. After Azzerone learned in a conversation with Schiffman a few months after the October date when trading began that Zahl was Segal's nominee, Azzerone was in telephone contact with Segal two or three times a week and Segal instructed Azzerone at what price to trade Pioneer (JA 519-21).

A. Segal, Clegg and Acton Transport Unregistered Stock To New York

As previously explained, Acton and Clegg gave Segal an initial block of 56,550 shares of Pioneer after the third meeting, for the purpose of commencing trading in Pioneer. A few weeks later, on November 5, 1969 Acton personally transported an additional 55,000 shares of Pioneer to Segal in New York.* This second block consisted of one-half of the 100,000 shares acquired by Clegg from the Van Der Steen estate and of a small 5,000 share issue in Zahl's name (GX 1E, 1F; JA 260). A separate transportation of 20,000 shares resulted from the trade through Knigge at the Nevada Transfer Agency to Gus Kostos at Orvis Brothers (JA 714-25, 946-56; GX 1D).**

B. Segal Sells Unregistered Stock

From late October through early November, Segal sold thousands of shares of unregistered stock through Zahl's account at Karen & Co. and through Orvis Brothers*** (GX 101A, 101B, 101C, 106B, 101D, 101E).

C. Securities Fraud by Segal

Segal was further convicted of ten counts**** of securities fraud in violation of 15 U.S.C. § 77q on the basis of the foregoing coupled with the following proof.

In October, 1969 Eddie Levine***** was employed in the fabric company of Abner Berman (JA 894). Eddie Levine

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* Together, they totalled 111,000 shares and constituted the charge in Count Two of interstate transportation of unregistered stock in violation of 15 U.S.C. § 77e(a)(2), 18 U.S.C. § 2.

** This transaction was the subject of Count Three.

*** These transactions were the subject of Counts Five through Ten charging sale of unregistered stock, in violation of 15 U.S.C. § 77e(a)(1) 18 U.S.C. § 2.

**** Counts 17 through 19, 21 through 23, 26 through 29.

***** Eddie Levine, deceased at the time of trial, was named in the indictment as an unindicted co-conspirator.

was the son of Jack Levine, a Segal associate (JA 767, 790-91, 847-48). Eddie Levine told Berman "that his father and some other gentleman were in on some stock deals and that this stock will earn over $2 a share on dividends within a few weeks" (JA 895). Eddie Levine told Berman that others were buying stock in the company and that the company was building mobile homes. (*Id.*). Relying on these representations, Berman entered the market in Pioneer. After an initial rise, the stock began to decline and Berman sold out at a small profit, only to be confronted by Eddie Levine, who told Berman he was "very, very foolish because the stock is going to go up tremendously" (JA 896-97). On November 10, 1969 Berman bought a thousand shares of Pioneer at $9 per share (JA 897); when it declined to 6½ by January 2, 1970 he bought 500 shares (JA 898); on January 23, 1970 Berman bought an additional 500 shares at $4 per share (JA 898). In all Berman expended more than $14,000 on Pioneer stock which he was unable to sell when it became worthless (JA 900).

After his initial purchase, Berman spoke to Robert Meyer,* who promptly purchased 1200 shares of Pioneer and subsequently made several other purchases in November and early December (JA 842-45; GX 132A). In late December, Meyer attempted to find out more information about Pioneer, not having seen any prospectus or registration statement (JA 846). Berman referred Meyer to Segal, with whom Meyer made an appointment (JA 846-47). Present at that meeting were Segal, Jack Levine and two other people (JA 847-48). Meyer specifically sought "some sort of accounting of the firm", and Segal replied that "the documents are being prepared and the accounting firm has them and they should be out in the next few days. . . ." (JA 849). Meyer and Segal and Jack Levine went to a nearby restaurant and discussed Pioneer over drinks. Segal there assured Meyer "the company was going to do very well"

* Meyer testified with respect to Counts 18 and 28.

and that "there was a Government contract coming through" on mobile home units (JA 851-52). Segal further represented that "the mine would be in operation shortly and he felt the stock would do well. . . . They would be in production on a much larger scale in a short period . . . and the stock should go up when the earnings come out from the company. . . . [Meyer] asked what the company would earn or what [Segal] might anticipate per share earnings would be. I don't believe he estimated for me what they would be, with the exception that there should be good earnings based on the production of the new mine and the mobile units" (JA 852-53). Meyer told Segal that he had recently been hospitalized and that "I could not afford to be hurt in this stock. If you don't feel it is a qualified situation I would take my loss and get out" (JA 854). Segal was adamant that the stock would shortly go up to $9 or $10 (*Id.*). Following that meeting, Meyer purchased additional shares of Pioneer as the price went down (JA 856; GX 132A). Meyer subsequently had a further conversation with Segal in which Segal repeated his assurance that "he had a great deal of faith in the company, that they would get this situation going again, the corporation, the stock price should go up . . ." (JA 857). Following that conversation, Meyer purchased additional shares of Pioneer (JA 858-59). Meyer, in turn, mentioned the stock to four other individuals who purchased the stock, including one Howard Nerenberg (JA 859-60).* Relying on Segal's representations, Meyer spent and lost in excess of $30,000 in the purchase of worthless Pioneer stock (JA 859, 861).

Howard Nerenberg purchased 500 shares of Pioneer at $8 7/8 on November 11, 1969, and made three additional purchases of Pioneer through December 1969 (JA 969, 960; GX 115). Nerenberg had been introduced to Pioneer

* Nerenberg testified as to Count 23.

through Meyer, who represented that he had heard good information about the stock and that "a Mr. Berman had recommended the stock to him" (JA 957-58). Nerenberg, in all, spent in excess of $10,000 on the worthless stock, having never received any prospectus or filings with the SEC in connection with the company. Nerenberg had never been told that the company had no assets nor that it was not in commercial production (JA 962).

Sol Fingar, while employed in the garment industry in 1969, purchased 2,000 shares of Pioneer at $8 per share and later 1,000 shares at $6¾ (JA 765; GX 133).* Like Berman, Fingar purchased the stock "on the recommendation of a young fellow by the name of Eddie Levine" (JA 767). Eddie Levine told Fingar "that it was a mining stock and that it would go up" (JA 768). Eddie Levine further promised Fingar that "some literature" on Pioneer "would be . . . coming out" but none was ever received by Fingar (JA 769). In all, Fingar spent in excess of $22,000 on worthless Pioneer stock (JA 766, 770).

Segal also attempted to create market activity through guaranteed purchases by personal friends, but in the end even these friends suffered large losses because the bottom fell out of the market for Pioneer. Thus, Doniel Aymes, who had been a personel acquaintance of Segal for several years, was told by Segal to purchase Pioneer stock "in my name for him and he would reimburse me . . ." ** (JA 963, 965). Pursuant to Segal's instruction, on November 7 and 10, 1969, Aymes purchased two blocks of one-thousand shares at $8½ and $8¾ per share respectively. (*Id.*) Segal had assured Aymes "that the stock would have a meteoric rise in the near future" (JA 966). Segal never paid Aymes for the stock; instead he drafted two checks which both bounced (JA 967). Aymes received no financial state-

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* Fingar testified as to Count 19.

** Aymes testified as to Counts 21 and 22.

ments, prospectuses or registration statements in connection with Pioneer (JA 968). Ultimately, Aymes was unable to sell the stock because of its worthless value (JA 965).

D. Means of The Fraud

Throughout the period of Segal's trading in New York, Segal, directly or through his co-conspirators, misrepresented the value and prospects of Pioneer stock and deceived potential buyers as to the nature and status of the shell corporation. Segal further engaged in manipulative devices such as directed trades, the hallmark of securities frauds.* Michael Gardner directed one such trade for Segal through a Canadian brokerage firm (JA 789). Gardner further contacted a broker named Michael Karfunkel at Economic Planning, who agreed to execute directed trades on Segal's behalf (JA 786). Thereupon, Segal himself engaged in a series of directed trades with Karfunkel on January 19, 1970, (JA 1045-46), January 21, 1970, (JA 1048), January 23, 1970 (*Id.*), January 27, 1970 (*Id.*), February 2, 1970 (JA 1050) and February 10, 1970 (JA 1052; see JA 788). Segal also directed a trade through Mann & Co. in New England (JA 789).** In this way, Segal created illusory market activity in Pioneer and deceived the unwary public into believeing that Pioneer was a worthwhile company.***

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* A directed trade is a trade in which the stock is sold at a predetermined price outside the market so as not to depress the market value by offering it for sale in the market.

** This was proved through the testimony of Solomon and Segal's account card at Mann & Co. When compared with Segal's order ticket at Orvis dated December 26, 1969, it is plain that Segal was selling to himself. (Compare JA 1019, GX 70-I with GX 113; as argued to the jury on summation at JA 1348).

*** It was the mailings in furtherance these directed trades, in addition to two mailings from Zahl to Knigge, which were the subject of the substantive offenses charged in Counts 30-46 charging mail fraud (18 U.S.C. §§ 1341, 2) (GX 1-G(1); 1-G(2); 120A, B; 106D; 104; 123; 1[illegible]4; 125; 126; 121; 127; 128 for Counts 30, 32, 33, 34, 37, 38, 39, 40, 41, 43, 44 and 45, respectively.)

Segal further used nominees to procure bank loans, pledging Pioneer stock as collateral.* On one such occasion, in the fall of 1969 Schiffman, at Segal's request, arranged a loan through Guaranty Trust Co. in Waltham, Massachusetts through a Leonard Close (JA 432). The bank loaned $50,000 to Mr. Close upon the signed guaranty of Kelli Jackson & Scott, a Segal nominee with Schiffman installed as nominal president (GX 28B; JA 433). On December 15, 1969 at the time the loan was transformed into a demand secured loan, 2,000 shares of Pioneer were pledged as collateral (JA 879-83; GX 28 D, E, F, G, H, I, J, L). An officer of the bank testified that the loan was never repaid (JA 884).

At Segal's request, in October, 1969 Schiffman procured a second loan for Kelli Jackson & Scott through the Industrial Bank in Everett, Massachusetts (JA 436-40; GX 27A). This loan was reduced in excess of $30,000 by the sale of Pioneer stock through Securities Planners in November, 1969 (JA 906-08; GX 27B, D, F, G, H).

In late 1969, Segal also arranged a third loan with the First Israeli Bank, using Pioneer stock as collateral (JA 775-77; GX 25-A, B, C, E). Segal owed one Zachary Swidler $15,000. Segal supplied Swidler with 2,000 shares of Pioneer to procure a loan of $10,000 (JA 681-85). Segal assured Swidler that the price of Pioneer would go up (JA 682). Swidler retained $5,000 of the loan and gave Segal the remaining $5,000 (JA 684). As the value of Pioneer declined, First Israeli requested additional collateral, and Segal gave Swidler 1,000 shares of Select Enterprises ** to put up as collateral (JA 687). After the price of both

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* Count One, means paragraph h(v), (vi), (vii).

** Select Enterprises is the subject of separate indictments, 75 Cr. 140, 346. The trial of that case, assigned to Judge Pollack, is now scheduled for September 29, 1975.

Select and Pioneer plummeted, Swidler was left to repay the entire $10,000 loan from First Israeli, which he did. Segal repaid nothing (JA 689).

6. Selling Continues In The West

From late August through early November, 1969, Acton had many conversations with Scardino concerning Pioneer stock (JA 240-41). On November 3 or 4, 1969 Acton told Scardino at the Riverside Hotel that the stock had opened on the market and that he had promised Segal "that I would not sell the stock" (JA 241). Acton told Scardino that the stock, however, could be used as collateral for a loan under the agreement with Segal. Acton and Scardino discussed the possibility of arranging a loan for Scardino and A.C. Enterprises* in the amount of $7,500, using Pioneer stock as collateral (JA 253-54, 576-77). Scardino did in fact receive a certificate in the amount of 5,000 shares of Pioneer (JA 576; GX 1E) for the purpose of securing a loan (JA 259). Acton received $13,000 (JA 265; GX 23D) plus $10,000 in the A.C. Enterprises account (GX 24C), while Scardino received at least $4,450 (GX 23G, 29, 151A) as proceeds of the "loan."

This "loan", however, was in fact a sale which transpired in the following way. Acton left a certificate in Scardino's name for 5,000 shares of Pioneer in Reno to be picked up by one of Scardino's employees, Richard McKibbon (JA 265; GX 1K). Scardino and McKibbon met with a broker, George T. Parris in Reno (JA 729). McKibbon told Parris that Scardino owned some stock which he wanted to sell, but that neither Scardino nor he had any brokers (JA 730). Scardino and McKibbon offered to sell Parris the stock at a discount.** Parris checked with

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* A.C. Enterprises was an account at the Crocker Citizens National Bank for the benefit of Acton and Clegg (JA 201, 537; GX 24A, 24B).

** At no time was it even suggested by Scardino or McKibbon that the stock was available only for a loan (JA 732).

John Parker, his broker at Hornblower, Weeks, Hemphill & Noyes, who advised Parris the stock was trading at approximately $7.00 per share (JA 731). After Parris returned to Tuscon, McKibbon telephoned to say that Scardino now had the certificate and if Parris could arrange to sell it, he would fly to Tuscon (JA 733). On November 7, 1969 Scardino, bringing the certificate with him, met Parris at a Tuscon bank, where Parris tried to arrange a loan from the bank to purchase the stock from Scardino (GX 1K; JA 734-35). Because it was too late in the day, the loan agreement could not be arranged (JA 735). Instead, Parris and Scardino agreed to meet in Denver for the purpose of selling the stock through Hornblower (JA 737-38). Scardino departed, retaining the 5,000 share certificate (JA 738). That weekend, McKibbon called Parris to say that he would meet Parris in Denver in place of Scardino. (*Id.*) On November 10, 1969 Parris and McKibbon sold the stock through Hornblower in exchange for a check in the amount of $36,459.53 (JA 739; GX 21A, 151A). Part of the proceeds* were taken by McKibbon and Parris for travel expenses but later were repaid to Scardino when Scardino objected (JA 744-45; GX 29). In Parris' words: "[McKibbon] said, 'Tony said "If you don't send the travel expense back to him he is going to come down and give you a haircut'" (JA 758). In addition Scardino received a cashiers check in the amount of $4,000 (GX 23G, 151A).**

In the meantime, Clegg continued his efforts to reaccumulate more of the outstanding shares of Pioneer and

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* At trial, the Government proved that the proceeds were disbursed as follows: $13,000 to Acton, $10,000 to A.C. Enterprises, $2,500 to Clayton, who introduced Scardino to Parris, $2,750 to a Sam De Sarno, $4,450 to Scardino, the rest of McKibbon (GX 23D, 24C, 23E, 23F, 151A.

** These events were corroborated, in part, by the testimony of John Parker, the broker at Hornblower through whom the sale was effected (JA 481-82).

succeeded in purchasing the 100,000 shares of Pioneer from the Van Der Steen estate at the price of ten cents per share (JA 578-80). Half of those shares were forwarded to Segal in New York, where Segal at the time was trading Pioneer stock at $5 bid and $6 asked on the over-the-counter market (JA 580, 583).

During early November, 1969 Segal repeated his boast to Clegg that he was experienced in the securities market, noting on the telephone from Dallas, Texas that "he had three companies that he dealt with that would trade the stock for him, which was First Philadelphia, . . . Economic Planning and . . . Shelly-Blitz . . . they would trade [the stock] as he directed them" (JA 586). Whenever a new seller entered the market in Pioneer, Segal called Clegg and "asked me if I had any control over these people to ask them not to sell their stock . . ." (JA 587).

In mid-November Segal became concerned that Pioneer stock not in his control had found its way onto the market. He called Clegg (JA 587); Clegg called Acton (JA 267). Acton called Scardino to determine if Scardino had been selling stock; Scardino assured Acton he had not. (*Id.*) Clegg and Acton flew to Houston to meet Scardino, who after placing a phone call, reassured Acton that the 5,000 shares which had been received and used for the "loan" had not been sold (JA 267-69).

In the hope of procuring funds to commence the mining operation, and believing that the 5,000 shares previously issued to Scardino had been used to secure a "loan", Acton asked Scardino if the source of "loan" money used in connection with the 5,000 shares was available for a second loan. Scardino said it was (JA 270). On November 14, 1969 a second certificate of Pioneer stock was issued in Scardino's name in the amount of 6,000 shares (JA 270, 580; GX 1H) and given to Clegg to give to McKibbon

(JA 273).* In a telephone conversation, Acton instructed Scardino to proceed with the second loan, and Scardino agreed (JA 273). As in the case of the 5,000 shares, these 6,000 shares were not used for a loan but rather were sold through Hornblower on Scardino's account (GX 20C).** Hornblower issued two checks to Scardino, one dated November 18, 1968 in the amount of $30,441 and another dated November 25, 1969 in the amount of $16,347.25 (GX 21B, 21C) for the sale of 6,000 shares of Pioneer (JA 365). The first check was picked up by Scardino and endorsed by him (JA 369, 493, 505). Scardino received $5,000 of the proceeds and A.C. Enterprises received $10,000 (GX 22C, 22E) with the remainder going to McKibbon (GX 22D, 151B). The second check was endorsed by McKibbon as attorney for Scardino with $1,000 going to Scardino (GX 32A) and $14,000 to A.C. Enterprises (GX 24F, 151B).***

In mid-December McKibbon effected the sale of an additional block of 18,000 shares of Pioneer stock through his own account at Hornblower (GX 20D). That sale resulted in a flow of $5,000 to Scardino's account at Fidelity Bank and Trust (GX 22H, 151C).****

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* That issuance was part of the recently reaccumulated Van Den Steen block of 100,000 shares referred to above (JA 270).

** The testmiony established that Scardino had been referred to Hornblower by Parris (JA 501).

*** Comparing the entry for November 25, on Scardino's account statement at Hornblower, which reflects a sale of 2300 shares as of November 18 (GX 20C), together with the confirmation from First Philadelphia concerning receipt of 2,000 of that block (GX 118), it was proved that Scardino was guilty of causing the interstate transportation of unregistered stock as charged in Count Four (See JA 1359). The counts charging sale of unregistered stock were all established through the sales on Parris' and Scardino's accounts as set forth above and in Government Exhibits 20C and 20A.

**** The Government proved that in each instance the sale of Pioneer through Hornblower was effected by use of interstate wires (JA 367-68, 487-88).

7. Enter Zuber And Finkelstein

In late December, 1969 Segal told Gardner "that some people that he was working with out west in Nevada were, in effect, treating him unfairly and robbing money from him, . . .: they had sold stock in Pioneer which was not supposed to have been sold into the market, and he, as a result, had to buy the stock . . ." (JA 793). Segal asked Gardner "whether [he] knew anyone [Gardner] could send out to talk to these people and sit down with them and see if the problem could be resolved" (JA 794). Gardner suggested "Bob Howard" (Howard Finkelstein) (*Id.*). A meeting between Finkelstein and Segal was arranged, with Gardner present. Segal told Finkelstein "[t]hat this group of individuals in Nevada had, in effect, been stealing money from him or taking advantage of him and of the situation and that . . . [h]e wanted someone to go out there and sit down with them and try to straighten it out" (JA 795). Later in December Gardner had a telephone conversation with Finkelstein, then in Nevada, who said he was in the process of gathering everyone together (JA 796). Late in December Gardner had a second telephone conversation with Finkelstein who reported "there had been a meeting and there were a lot of people involved . . . and they brought some people in from the West Coast. . . ." (*Id.*). Gardner testified that during these telephone conversations Finkelstein said that he had brought in Zuber to "help him with the problem" (JA 797).

8. The Reno "Sit Down"

Some time between Christmas and New Year's, as Clegg was leaving his house, Zuber accosted Clegg and said "that he was representing Mr. Segal, that there was money owed Mr. Segal because the stock had been sold and that he was there to collect the money for it" (JA 590). Zuber said that $200,000 was owed Segal (JA 590-91). Clegg testified that Zuber's words were threatening, to the effect that "you owe Segal this money and if you don't

pay it it's not going to be very pleasant for you" (JA 592). Clegg specifically recalled seeing a gun tucked in the top of Zuber's pants on the right-hand side (JA 592-93). Clegg immediately called Segal and told Segal that he had sold no stock, but that some shares had been given to Scardino to secure a loan (JA 594). Clegg handed the phone to Zuber so that he could confer directly with Segal; then Zuber left (JA 595).

Shortly thereafter Zuber confronted Acton on Acton's doorstep in California and said, "We got to get the stock situation straightened out. We have to go to a meeting and get it straightened out" (JA 284-85). Acton entered Zuber's car, where he saw Finkelstein, who repeated that "We had to go to Reno and straighten out the situation of the stock" (JA 285-86). Acton noticed that Zuber was carrying a gun tucked inside his belt or clothing (*Id.*). Acton was abducted to Reno in his shirt sleeves without even having an opportunity to tell his wife where he was going. Once in Reno, he had to borrow a coat from Sheldon Lamb and was permitted to telephone Clegg to have him tell his wife where he was (JA 287, 289; 596).

At the Holiday Inn in Reno, a meeting was held with Zuber, Finkelstein, Acton, Scardino, McKibbon and Al Glazier, McKibbon's companion (JA 290; 597). At the meeting Zuber said, "Somebody has been selling the stock. We want to know who it is" (JA 291). Scardino said, "I would like to know myself. It definitely wasn't me" (*Id.*). McKibbon started talking but Zuber, talking very loud, interrupted: "You're lying." (*Id.*). Thereupon, "[Zuber] either choked [McKibbon], hit [McKibbon] with his hand, and Mr. McKibbon said right after that, 'Yes, I did sell the stock.'" (*Id.*). McKibbon then agreed to repay the money to Segal. (*Id.*). Zuber said he wanted the money and stock that had been sold. Acton testified that "Mr. Scardino said the money that he had gotten he would certainly repay" (JA 292). After the meeting, at the bar in the hotel where

the meeting took place, Scardino told Acton "that he would pay back the money that he got, being the $7,500, but he wasn't paying the money Mr. McKibbon had paid to Mr. Glazier for protection because he didn't want any protection, didn't ask for any" (JA 293).

9. Zuber and Finkelstein Exchange Pioneer Stock For Fur Coats

When Zuber and Finkelstein returned to New York, Finkelstein told Gardner that "he wanted to buy a fur coat or fur coats for his wife. . . ." Finkelstein asked Gardner if "I knew a furrier that they might be able to deal with for stock as opposed to cash." Gardner referred Finkelstein and Zuber to Allen Grant, a furrier in Manhattan (JA 800). Gardner called Grant and arranged for Zuber and Finkelstein to meet him to negotiate the purchase of fur coats (JA 801, 913-14). That day Zuber and Finkelstein went to see Grant (JA 915). Zuber told Grant that "he wanted to buy some furs" and that "he has to get quite a few coats and he would exchange stock for coats." (*Id.*). Zuber specifically offered to exchange Pioneer stock which he told Grant was "a very good stock, selling about $6 at the time, and they intended it to go very high" (JA 916). Zuber further told Grant that "the only way he would make the sale, the stock in exchange for the coats, was if [Grant] gave him a letter saying that [Grant] would not sell the stock for 60 days and gave him the option to buy back the stock at $10." (*Id.*). On Zuber's representation and the inducement in the option wherein Zuber valued the stock at ten dollars, Grant agreed to exchange seven fur coats valued at $15,000 for $42,000 worth of Pioneer stock, after the coats had been lined (JA 917-18, 921). On January 10, Zuber returned to Grant's store with Finkelstein and his wife, and Acton (JA 919, 295). Zuber gave Grant 6,900 shares (JA 917, 296). Grant and Zuber both signed the option to buy the stock, which Finkelstein witnessed (GX 63B). In exchange,

Grant gave the defendants one sable, five mink and one tourmaline coat (GX 63A). Acton took three, giving one to Shepherd, one to Clegg, and retaining one for himself (JA 296, 598-99). Part of the arrangement was for Finkelstein to get a fur coat (JA 390). That day Grant spoke with Segal in Gardner's presence concerning Pioneer. Segal assured Grant that Pioneer "was a very good company and he said he would like to buy some additional shares" (JA 924). After the 60 day period elapsed, Grant attempted to sell the stock but could not because it was worthless (JA 925).

10. Finkelstein Sells To Karfunkel

In February, 1970, Finkelstein telephoned Karfunkel to arange the sale of 10,000 shares of Pioneer stock (JA 1054). The two men met at the Americana Hotel (JA 1055). Karfunkel gave Finkelstein $4,500 as a down payment on the stock after Finkelstein represented that the stock "would be a good investment and [that Karfunkel] would be able to make money in the future by buying the shares" (JA 1054). Karfunkel later made subsequent payments to Finkelstein for the balance (JA 1057-58; GX 61B, 61C, 61D).

C. The Defendants' Case

None of the defendants testified on his own behalf. Neither Zuber nor Scardino nor Finkelstein called any witnesses. Defendant Segal called two witnesses, Michael Grimes and Myron Buttram, the former in an effort to impeach Clegg and the latter to try to establish a "good faith" defense for Segal.

Grimes testified that he owned a brokerage firm called Grimes, Hopper & Messer. In late 1969, Clegg and others visited Grimes to discuss the sale of Pioneer stock. Grimes testified that Clegg's associates had sold stock through his firm and that Clegg had brought in some shares in the name of Jay Walker (JA 1139-46).

Buttram testified that he owned certain ore mining patents (JA 1149). On November 24, 1969 Buttram had a telephone conversation with Segal and once in January 1970 the two men met (JA 1150-51, 1153). That was the extent of their contact with each other. On each occasion the mine was discussed (JA 1152-53, 1154, 1157-58). On cross-examination, Buttram testified that he first installed a road grading machine at the mine on February 6, 1970 and that none of the other equipment was installed by Buttram until weeks after the Pioneer corporation had been sold by the conspirators (JA 1164-65). Instead of establishing Segal's "good faith" belief in Pioneer, Buttram's testimony actually supported the prosecution by revealing the passing and belated interest that Segal had in the viability of the mine. The Government's proof was unrefuted that none of the proceeds of the stock trading was ever forwarded by Segal to fulfill his original promise to supply the necessary $500,000 to commence the commercial operation of the mine.

ARGUMENT

POINT I

The Government's Proof Established A Single Conspiracy And There Was No Prejudicial Variance.

Segal and Scardino both attack their conviction on the conspiracy count, Count One. Segal claims that there was a material variance between the indictment and proof, asserting that two conspiracies were proved, and that this variance resulted in prejudicial error. Scardino, on the other hand, asserts that three conspiracies were proved, and raises several other related points * which are said to warrant reversal.

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* Scardino also argues that the government misstated to the jury Scardino's agreement to repay the proceeds of the Western sales and that the Court's charge was erroneous. These arguments will be treated within this point in the proper context.

The indictment charged the object of the conspiracy as follows:

> The object of this conspiracy was to secure control of many thousands of shares of stock, never registered with the S.E.C., in an inactive 'shell' corporation, namely Pioneer, then to establish an artificial market in the stock through manipulative devices, including quotes at arbitrarily selected prices, touting, giving assurances against loss, and directing trades, and then finally to sell, pledge and distribute this unregistered stock at artificially high prices to purchasers and lenders in order to fraudulently obtain many hundreds of thousands of dollars at their expense (JA 9-10).

The Government's proof at trial conformed and was not at variance with this alleged object of the conspiracy. After Acton and Clegg had accumulated the bulk of the controlling shares in Pioneer, they explained to Scardino their plan to raise funds for a mine (JA 216, 558). Scardino volunteered that he had just the man to suit Acton's and Clegg's need: "a partner in the Riverside who was very adept at [stock trading]" (JA 558). Scardino touted Segal as "one of the best in the country at . . . trading stock" (JA 560). Scardino arranged the meeting which took place in Dallas in Scardino's home state of Texas. Present were Scardino, Segal, Acton and Clegg (JA 217). Clegg explained that a controlling block of outstanding shares had been accumulated with a view for redistribution (JA 546). Segal promised to supply Acton and Clegg with the $500,000 necessary to put the proposed mercury mine which had not yet been acquired into commercial operation (JA 221, 548-49). Segal cautioned the conspirators that they would have to follow his instructions to be successful in raising the funds. He boasted that he was experienced in these ventures, citing another situation where his instructions were

not followed and the stock plummeted in value (JA 547-48). Segal explained that his method for raising the funds would be by personally deciding the price to open the market in Pioneer and by making sure it would not decline in value (JA 548). One of the means, outlined by Segal, to insure an artificially high price was to keep the accumulated stock that remained with Acton and Clegg in the West off of the market unless Segal, in New York, sanctioned its sale (JA 548-49).

The agreement not to sell in the West and the details for manipulating the price were further discussed at a second meeting in Los Angeles with Acton, Clegg, Jay Walker, Segal and Stuart Shiffman, Segal's lawyer (JA 223, 551-52, 422). While there was some discussion at this meeting as to future acquisitions by Pioneer, there was "no actual proof of the value of any of the assets that [Pioneer] owned nor of the ones that they intended to acquire" (JA 426-27).

A third meeting was held between Acton, Clegg and Segal at which Segal was given 56,550 shares of accumulated Pioneer to transport to New York for the purpose of opening trading (JA 230-31, 252,564; GX 1A). While Segal promised to repay the individuals in whose names the stock was issued, he never did (JA 565). Similarly, the $20,000 check which Segal gave to Sheldon Lamb at this third meeting to cover operating capital for the mine was later returned for insufficient funds and was never made good by Segal (JA 566, 583-84, 232-33, 238).

Upon his return to New York, Segal commenced selling Pioneer stock at arbitrarily selected prices (JA 1081, 430). As outlined above, Segal employed manipulative devices such as directed trades, unfounded and false representations concerning Pioneer's assets and worth, and he concealed his own market activity in Pioneer through the use of nominees.

In the meantime, none of the proceeds of these stock sales by Segal was transmitted back to Acton and Clegg, who remained for the most part in the West, despite Segal's original promise to supply them with funds for the operation of the mine (JA 225, 601). In need of money, Acton and Clegg turned to Scardino, who represented that he could arrange a loan using Pioneer as collateral. The proof established that Scardino, with the assistance of McKibbon, a Scardino employee, in fact effected a sale of the Pioneer stock, even though Scardino knew this was counter to both Segal's original instructions and Acton's repeated caution (JA 241; GX 151A). A second "loan transaction" was also arranged by Scardino (GX 151B). Later, in mid-December, McKibbon effected a third sale of Pioneer stock (GX 151C). Scardino received in excess of $14,000 from these three transactions alone.

While these Western sales ran counter to Segal's instructions, Segal and Scardino are mistaken in arguing that they constitute a separate conspiracy. Scardino's argument, dividing the evidence into three conspiracies, like Segal's dividing it into two, ignores the common purpose, common needs, common means and common ends shared by all of the members of the various conspiracies they construct. *United States* v. *Crosby*, 294 F.2d 928, 944-45 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962). The Western sales were nothing more than typical instances of "backdooring" by co-conspirators which commonly occur in securities frauds involving, as here, manipulations requiring control of the market. E.g. *United States* v. *Koss*, 506 F.2d 1103, 1108 (2d Cir. 1974),* *cert. denied*, — U.S. — 95 S.Ct. 1402, 1565 (1975) Segal himself described the backdooring to Gardner as "some people *that he was working with* out West were, in effect, treating him unfairly

* Koss made a "multiple conspiracy" argument somewhat similar to that raised here (see Koss' Brief, Point II, pp. 28-32), which the Court rejected without discussion.

and robbing money from him" (JA 793; emphasis supplied). Thus, the Western sales that were proved were not a separate conspiracy but rather some of the conspirators' greedy efforts to benefit at the expense of their partners, from the inflated prices at which Pioneer was selling as a result of the conspiracy of which they were all a part. *United States* v. *Salazar*, 485 F.2d 1272, 1276 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Torres*, Dkt. No. 74-2303 (2d Cir. July 2, 1975), slip op. at 4582. See also *United States* v. *Mallah*, 503 F.2d 971, 980 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 24, 1975). Furthermore, appellants' arguments wash out in the face of the Government's proof that both McKibbon and Scardino agreed to disgorge themselves of the proceeds they had received from these Western sales (JA 291-93). In this way Scardino and McKibbon repaired the damage, keeping the single conspiracy intact.*

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* In this context, Scardino asserts that in summation the Government misstated Scardino's agreement to repay the proceeds he realized as having been to repay Segal (JA 1369). Scardino here asserts that his agreement was to repay Acton, not Segal. The testimony, when viewed in a manner most favorable to the Government, *United States* v. *Cirillo*, 468 F.2d 1233, 1238 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973) plainly supports the interpretation argued by the prosecution on summation that Scardino agreed to repay Segal (JA 291-93). In any event, when counsel objected below to the summation, the trial court correctly overruled the objection, noting that the testimony on this issue would be "for the jury's recollection" (JA 1369). Indeed, the jury had this testimony re-read to them during their deliberations and were able to draw their own conclusions from the testimony, without relying exclusively on the Govenrment's summation (JA 1475, 1479).

Moreover, since Scardino claims that the one conspiracy (of the three allegedly sworn) that he was not a member of was "Conspiracy 1—the conspiracy between Clegg, Acton and Segal to manipulate the stock of Pioneer so the price would rise" (Scardino's Brief at 22), it would seem to be of little relevance whether the money was to be repaid to Segal or, as Scardino claims, to Acton.

Thus, Scardino's independent actions amply support the jury's verdict that Scardino was a willing participant in the conspiracy, the object of which was to obtain money through the fraudulent sale of unregistered stock. Scardino introduced Segal to Acton and Clegg as "one of the best in the country at . . . trading stock" and as being "very adept at [stock trading]." Scardino was present at the meeting where the manipulation scheme was first outlined by Segal (JA 216-17). Scardino personally benefitted from the scheme by selling thousands of shares of unregistered Pioneer under the guise of making a "loan" after he learned that the stock had opened in New York. And finally, Scardino went to the Reno "sit down" where Zuber demanded that Segal be repaid, and Scardino consented (JA 292-93). While Scardino's "backdooring" may be viewed as cheating on his co-conspirators, it was plainly part of the larger conspiratorial parcel to take advantage of the inflated price of Pioneer for personal profit. Scardino was hardly on the periphery, as counsel would now have it.

Here, the issue whether there was one conspiracy or several was properly submitted to the jury. See *United States* v. *Torres*, *supra*; *United States* v. *Crosby*, *supra*, 294 F.2d at 945; *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845, 869 (1964), 381 U.S. 955 (1965); *United States* v. *Porter*, 441 F.2d 1204, 1212 (8th Cir.), *cert. denied*, 404 U.S. 911 (1971); *Jolley* v. *United States*, 232 F.2d 83, 88 (5th Cir. 1956). Judge MacMahon charged in pertinent part:

> "If you find that instead of one overall conspiracy, there were separate and independent agreements unrelated to one central plan or scheme or common purpose, you must conclude that the Government has failed to prove the single conspiracy charged in its indictment and acquit all of the defendants" (JA 1450).

The jury by its verdict rejected the claim now made.

Scardino points to this instruction alone and argues that it constitutes the all-or-nothing charge condemned in *United States* v. *Borelli*, 336 F.2d 376, 384-86 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965) and *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). Scardino, however, omits reference to the other portions of Judge MacMahon's charge which completely distinguished *Borelli* and *Kelly*. Judge MacMahon was careful to further instruct the jury:

> "Now in the determination of guilt, you must bear in mind that guilt is personal, that guilt or innocence of each defendant on trial before you must be determined separately with respect to him, solely on the evidence presented against him or on the lack of evidence.
>
> * * * * *
>
> In deciding whether a defendant joined the conspiracy, you must base your decision not on what others may have said or done, but only on what the defendant himself said or did. In other words, on the question of membership in a conspiracy you can only consider a defendant's own actions, his own conduct, and his own statements" (JA 1397, 1452-53).

Additionally, on three separate occasions in the course of his instructions, and again, a fourth time, in response to a related jury question, Judge MacMahon cautioned the jury to the effect that they had to consider each defendant separately (JA 1457, 1458, 1459, 1474). The Court further reinforced the need to separate each defendant by inserting the phrase "as to the defendants whom you are considering" (JA 1457, 1458, 1459, 1460) when explaining the criteria for determining guilt or innocence.

The Court's instructions in this case were thus similar to those sanctioned most recently in *United States* v. *Cohen*, Dkt. No. 74-2026 (2d Cir. June 26, 1975), slip op. at 4420-21, citing with approval *United States* v. *Sperling*, 506

F.2d 1323, 1341 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (March 3, 1975), and *United States* v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). In *Cohen*, this Court approved a charge to the jury which stated:

> ". . . if you find that the government has failed to prove the existence of only one conspiracy, you must find the defendants not guilty"

when that instruction was "joined . . . with other instructions which required the jury to find that Cohen entered the conspiracy wilfully, and which required the jury to consider each defendant's actions individually." *Id.*, slip op. at 4420-21.

Similarly, *Bynum* rejected the appellant's characterization of the court's charge as an all-or-nothing charge, since appellant "fail[ed] to consider other portions of the trial court's charge which made it perfectly clear to the jury that if each of the defendants was not a knowing participant in the conspiracy he must be acquitted." 485 F.2d at 497.

In addition to those portions of the charge already set forth, Judge MacMahon instructed the jury in conformity with *Cohen* and *Bynum* that for a defendant to be a conspirator, he must "know of the conspiracy and knowingly join in the venture with an intent to join with others in violating the law." The Court specifically eschewed unwitting assistance, mere presence at meetings or even "an isolated transaction in Pioneer stock with members of a conspiracy" as insufficient to warrant a guilty verdict on Count One. The Court charged, "In deciding whether a defendant joined the conspiracy, you must base your decision not on what others may have said or done, but only on what the defendant himself said or did. In other words, on the question of membership in a conspiracy you can only consider a defendant's own actions, his own conduct, and his own statements" (JA 1452-53).

In this regard, Scardino inaccurately sets forth the Court's instruction concerning "knowingly" by citing only an incomplete portion of the relevant passage (Scardino Brief at 25). The full instruction was:

> The word 'knowingly' simply means that the defendant must have known what he was doing, that he was acting intentionally, and not because of accident, mistake, carelessness, negligence or other innocent reason. An act is done knowingly if it is done voluntarily and purposely, and not because of mistake, inadvertence or other innocent reason. An act is wilful if it is done knowingly and deliberately (JA 1411).

Later, specifically in the context of the conspiracy charge, the Court explained: "You will also note that the indictment says the defendants acted unlawfully, wilfully and knowingly. This means that the defendant must have known what he was doing and that he consciously entered into the unlawful scheme, in short, that he must have guilty knowledge that he is joining with others to violate the law. I refer you to my earlier instructions on the subject of knowledge and wilfulness and charge you to apply them here" (JA 1452).

There was therefore no possibility that Scardino was convicted merely because the jury feared that his acquittal would also free Segal. The jury returned a verdict of guilty as to Scardino on the merits of the Government's case against Scardino. As this Court wrote in *United States* v. *Calabro*, 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), 405 U.S. 928 (1972), "There is no reason to believe that the jury here could not distinguish the evidence to be considered against each defendant."

Similarly without merit is Segal's contention that reversal is required because a prejudicial spillover resulted from the introduction of evidence of a conspiracy in which

Segal was not involved and consideration of that evidence by the jury in their deliberation concerning the conspiracy in which Segal was a participant. *United States* v. *Cohen*, *supra*, slip op. at 4442-43; *United States* v. *Koss*, *supra*, 506 F.2d at 1114. See also *United States* v. *Torres*, *supra*, slip op. at 4582. In the first place the argument is patently frivolous in that there was only one conspiracy charged and found. As explained above, there was overwhelming evidence to support the jury's factual determination on the proper instructions that were given that a single conspiracy existed; that determination should not be overturned by this Court. *Id.*; *United States* v. *Tramunti*, 513 F.2d 1087, 1107 (2d Cir. 1975); *United States* v. *Sperling*, *supra*, 506 F.2d at 1341; *United States* v. *Marchisio*, 344 F.2d 653, 666 (2d Cir. 1965). Moreover, even if more than one conspiracy were shown, it is hard to see how Segal could have been prejudiced, for the activities of those he claims not to have been conspiring with were hardly different or more flagrant than his. *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975). In any event, any variance that may be found between the proof and the indictment resulted in no demonstrable prejudice in light of the Court's careful instructions. *United States* v. *Bynum*, *supra*; *United States* v. *Cohen*, *supra*; *United States* v. *Wayman*, 510 F.2d 1020, 1025 (5th Cir. 1975); cf. *United States* v. *Varelli*, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1972); and *United States* v. *Butler*, 494 F.2d 1246, 1256 (10th Cir. 1974),* where the court's specifically noted that correct instructions such as those given here would be curative.

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* The cases cited by Segal in his brief at 56 hardly support his claim here. *United States* v. *Russano*, 257 F.2d 712 (2d Cir. 1958), involved proof of two conspiracies four years apart; in *Butler*, *supra*, the court implied proper instructions could be curative; in *United States* v. *Cruz*, 478 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973), the convictions were not reversed; in *Brooks* v. *United States*, 164 F.2d 142 (5th Cir. 1947), the government offered no proof of a single conspiracy; in *United States* v. *Bostic*, 480 F.2d 965 (6th Cir. 1973), the convictions were reversed for insufficient proof, not as a result of a prejudicial variance.

Similarly without merit is Scardino's claim of spillover. Since the evidence supports both the jury's verdict of a single conspiracy as well as its finding that Scardino was a member of that conspiracy under the proper instructions that were given, Scardino's "contention that the trial judge abused his discretion in failing to serve fails a fortiori." *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972). Here, Judge MacMahon repeated his caution to consider each defendant individually at least four times and amply cured the potential dangers of a *Kelly*-type "spillover". *United States* v. *Quinn*, 445 F.2d 940, 945 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971); *United States* v. *Bynum*, *supra*; *United States* v. *Cohen*, *supra*; see also *Opper* v. *United States*, 348 U.S. 84, 95 (1954). Moreover, the jury's selective verdict as to each count demonstrates the jury's ability to adequately sift the complicated evidence. It is clear that the jury attributed guilt to each defendant only on those counts where they were reasonably satisfied of the evidence against the defendant being considered. *United States* v. *Berlin*, 472 F.2d 13, 15 (9th Cir. 1973).

Segal's claim that the trial court's instructions may have led the jury to find a single conspiracy on the basis of an agreement between Acton and Clegg alone is entirely deficient. Under the standards announced by this Court in the cases cited above, the charge here on the multiple conspiracy was the approved charge in these circumstances. Further, Segal's argument ignores earlier portions of the charge requiring a finding of "one common understanding or agreement linking the separate acts of various individuals together for the same unlawful . . . purpose" (JA 1450). Also ignored is the later instruction that a defendant must wilfully join the conspiracy with knowledge of its unlawful purpose (JA 1451). Moreover, Segal did not object below to this portion of the charge. *United States* v. *Bentvena*, 319 F.2d 916, 938-40 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *United States* v. *Pinto*, 503 F.2d 718, 723 (2d Cir. 1974).

POINT II

The Trial Court's Instructions Of *Pinkerton* Did Not Prejudice Appellants' Convictions On The Substantive Counts.

In view of the foregoing argument and this Court's recent approval of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), in *United States* v. *Aloi*, Dkt. No. 74-1220 (2d Cir. July 7, 1975), slip op. at 6093, Segal's and Scardino's claims that their convictions on the substantive counts must be reversed are without merit.*

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* In light of the correctness of the jury's finding that the single conspiracy charged was proven, the corollary to the multiple conspiracy argument—that the *Pinkerton* charge infected the convictions of Scardino and Segal on the substantive counts—must also be rejected. Scardino's obscure argument that the *Pinkerton* charge was improper here quite apart from his claim of multiple conspiracies is disposed of by the improperly restricted view he takes of the Government's proof of his central participation in the scheme and the fact that the substantive crimes upon which he was convicted only related to Pioneer transactions in which Scardino was directly involved.

POINT III

The Trial Court's Denial Of Appellants' Motions For Severance Was Not An Abuse Of Discretion And Did Not Result In Substantial Prejudice To Appellants' Rights To A Fair Trial.

Appellants Scardino and Zuber moved for severance below. They now claim that denial of their motions resulted in an unfair trial because they were deprived of Segal's testimony, and because there may have been a "spillover" as a result of permitting the jury which determined their guilt to hear also the overwhelming case against Segal. In addition, Zuber asserts that he was deprived of Finkelstein's testimony by virtue of their joint trial. Since the joint trial did not result in any demonstrable prejudice, the trial court did not abuse its discretion in denying appellants' motions for severance.

It is settled that the grant or denial of a motion for severance under Rule 14 of the Federal Rules of Criminal Procedure * is within the sound discretion of the trial judge, *Opper* v. *United States, supra,* 348 U.S. at 95; *United States* v. *Projansky, supra,* 465 F.2d at 138; *United States* v. *Mazzochi,* 424 F.2d 49, 52 (2d Cir. 1970), and that denial of a motion for severance will be reversed only upon a clear showing that there has been an abuse of that discretion. *United States* v. *Jenkins,* 496 F.2d 57, 67-68 (2d Cir. 1974), *cert. denied,* 420 U.S. 925 (1975). An abuse of discretion may be found only if the joint trial, was "manifestly prejudicial" *United States* v. *Berlin, supra,* 472 F.2d

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* Rule 14 provides in pertinent part:

"If it appears that a defendant . . . is prejudiced by a joinder of offenses . . . in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

at 15, or if the trial resulted in "substantial prejudice" to a defendant's fundamental right to a fair trial. *United States* v. *Morgan*, 394 F.2d 973, 978 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968). Thus, inability to proffer evidence otherwise available is not necessarily a sufficient basis to overturn a conviction for failure to sever. See *Smith* v. *United States*, 385 F.2d 34 (5th Cir. 1967). Nor is joinder with a disreputable co-defendant a sufficient basis to warrant reversal, as "[A] man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats." *United States* v. *Fradkin*, 81 F.2d 56, 59 (2d Cir. 1935, A. Hand, *J.*), *cert. denied*, 297 U.S. 720 (1936). In addition, economy of time and judicial administration must be factored into the balance. *United States* v. *Crisona*, 271 F. Supp. 150, 154 (S.D.N.Y. 1967, Mansfield, *J.*). It is the defendant's burden to come forward with facts demonstrating that he will be so severely harmed by a joint trial that it would in effect deny him of a fair trial altogether. *United States* v. *DeSapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). This burden has been described as "a difficult one, and the ruling of the trial judge will rarely be disturbed on review. 8 Moore, Federal Practice ¶ 14.02 [1], p. 14-3 (2d ed. 1968)." *Tillman* v. *United States*, 406 F.2d 930, 935 (5th Cir.), *vacated as to one defendant on other grounds*, 395 U.S. 830 (1969).

Appellants unconvincingly rely on five of those rare instances where a trial court's denial of severance was overturned on appeal. *United States* v. *Martinez*, 486 F.2d 15 (5th Cir. 1973); *United States* v. *Shuford*, 454 F.2d 772 (4th Cir. 1971); *Byrd* v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *United States* v. *Echeles*, 352 F.2d 892 (7th Cir. 1965); *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). These cases are inapposite to the facts of this case, as indicated below.

Moreover, a careful analysis of each case supports the conclusion that Judge MacMahon properly denied severance when applying the criteria for severance as articulated by the courts to the facts of this case. In *Byrd,* the Fifth Circuit examined five elements pertinent to severance: (1) the intent of movant to have a co-defendant testify, (2) the sufficiency of the showing that the testimony would be exculpatory, (3) the sufficiency of the showing that the co-defendant would testify at a severed trial, (4) the counter-arguments of judicial economy and administration, timeliness of the motion, and (5) the possibility of prejudice arising from a co-defendant's plea of guilty at trial. 428 F.2d at 1019-20.

In this case, the counter argument that severance here would have imposed an undue burden on judicial economy and time supports Judge MacMahon's denial of the severance motions. Here, thirty-two witnesses and approximately three hundred and thirty-five exhibits were presented in this complicated securities fraud case which consumed nine days of trial. Had the motions for severance been granted, the trial court would have been burdened with precisely the kind of "duplication of an unusually complex trial" which *Shuford* itself acknowledged could counterweigh against severance. 454 F.2d at 777 n. 5. See also *United States* v. *Martinez, supra,* 486 F.2d at 23. Moreover, the motions to sever, insofar as they were premised on the desire to call Segal and Zuber, were properly denied for insufficiency of the showing of the second and third elements enumerated by *Byrd.* There was inadequate showing that either would testify at a severed trial on behalf of the appellants, as indicated below. *See United States* v. *Kahn,* 381 F.2d 824, 841 (7th Cir.), *cert. denied,* 389 U.S. 1015 (1967); *Gorin* v. *United States,* 313 F.2d 641, 646 (1st Cir.), *cert. denied,* 374 U.S. 829 (1963); *United States* v. *Sanchez,* 459 .2d 100, 102 (2d Cir.), *cert. denied,* 409 U.S. 864 (1972). Indeed, *United States* v. *Echeles,* relied upon by appellants, has been severely limited to its

facts where the co-defendant had already given exculpatory testimony on three occasions and certain evidence was admitted against him but not the movant. *United States* v. *Ellsworth*, 481 F.2d 864, 870 (9th Cir.), *cert. denied*, 414 U.S. 1041 (1973); *United States* v. *Isaacs*, 493 F.2d 1124, 1160 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). Appellants have also made no clear showing that the proffered evidence would be sufficiently exculpatory in view of its cumulative nature; a failure also attributable to Zuber's desire to call Finkelstein. *United States* v. *Thomas*, 453 F.2d 141 (9th Cir. 1971), *cert. denied*, 405 U.S. 975 (1972). The very cases cited by appelants recognize that when the proffered testimony would be cumulative the court is not required to sever. *Byrd* v. *Wainwright*, *supra*, 428 F.2d at 1021; *United States* v. *Shuford*, *supra*, 454 F.2d at 777 (emphasizing that no one else could have given the desired testimony); *United States* v. *Martinez*, *supra*, 486 F.2d at 22 (noting that "the trial judge might properly consider the exculpatory nature and the significance of the desired testimony to the movant's defense . . .").*

A detailed analysis of each appellant's claim demonstrates that Judge MacMahon properly denied severance in this case.

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* In *Martinez*, it was a co-defendant's confession which exculpated the movant, a situation, like *Echeles*, where the proffered testimony was against the penal interest of the declarant and therefore entitled to great weight. Here the proffered statements were exculpatory of the declarant and therefore not as probative of appellants' claims of innocence. In *Kelly*, severance was ruled to be necessary, not because of the need of one defendant for the exculpatory testimony of a co-defendant, but because the circumstances of the trial caused severe prejudice to the appellant. *Kelly* was a highly complex trial, involving 160 counts in the indictment, twenty defendants and twenty-eight co-conspirators; the trial lasted for nine months, and the record showed that the appellant was only a very minor figure in the conspiracy. Further, the trial court failed to give instructions to the effect that each defendant had to be considered separately.

a) There Was Inadequate Showing That Co-defendants Would Not Testify Below, And That They Would Testify At A Subsequent Trial.

1. Zuber and Scardino claim they were deprived of a fair trial because defendant Segal was unavailable as a witness on their behalf.

It is significant that none of the defendants even attempted to call Segal. At the close of the Government's case, and after Segal's two witnesses had testified, all defendants rested * (JA 1169). None approached the bench to request a hearing on this issue outside the jury's presence. Only at the Court's behest after the defendants had rested were motions renewed, including motions for severance. Even then, nothing more than counsel's assertions were offered to show that Segal's testimony would be sufficiently exculpatory and that, absent Segal's testimony, the defendants would be denied a fair trial. For this reason the motions were correctly denied for insufficient showing of prejudice (JA 1171, 1172). *United States* v. *Crisona*, *supra*, 271 F. Supp. at 154. Moreover, counsel offered no basis ** to support a finding that Segal would have waived his Fifth Amendment right to remain silent at a separate trial. *United States* v. *Kahn*, *supra*, 381 F.2d at 841; *Gorin* v. *United States*, *supra*, 313 F.2d at 646.

2. Similarly, Scardino's claim that he was denied the opportunity to call Zuber as a witness is without merit. At no point did Scardino represent, much less establish a

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* Scardino offered one exhibit by stipulation and then rested (JA 1169).

** Richard Kirschner, Zuber's counsel, offered Kirschner's own affidavit that "there is a strong likelihood Mr. Segal would testify on behalf of Mr. Zuber" (Zuber's Brief at 22). That statement, however, is not attributed to either Segal or Segal's counsel. Therefore, it constitutes a mere assertion without basis.

basis for a finding, that Zuber would not testify at the present trial but would waive his Fifth Amendment right at a subsequent trial. The closest counsel came was the statement that:

> "If the defendant Zuzer were called as a witness for Anthony Scardino, he would testify that at a meeting in Reno at which were present Mr. Scardino and Mr. McKibbon, Mr. McKibbon confessed to Mr. Zuber that Mr. McKibbon had sold shares of Pioneer stock, had kept the proceeds, and that Mr. Scardino knew nothing of the sale.
>
> I have been advised that it is also unlikely that Mr. Zuber would testify, if called as a witness, in this trial, for Mr. Scardino" (JA 865).

Counsel's representation that it is *unlikely* that Zuber would have testified below was hardly a sufficient showing that Zuber would have declined to testify if called. See *United States* v. *Sanchez*, *supra*, 459 F.2d at 102. Indeed, counsel for the Government believed at that time that Zuber would be called to testify (JA 866). At the close of the evidence, Scardino made no attempt to call Zuber to the stand (JA 1169). Nor did counsel's summary of the substance of Zuber's testimony should Zuber have testified (JA 865) constitute an adequate showing that Zuber would have waived his right to remain silent at a subsequent proceeding against Scardino. Therefore, Judge MacMahon properly denied Scardino's motion on this ground (JA 866, 1172). *United States* v. *Crisona*, *supra*.

b) Unavailability Of Co-Defendants As Witnesses Did Not Result In Substanital Prejudice.

1. *Scardino.* Scardino asserted at trial that he suffered prejudice as a result of Segal not testifying, because Segal "would testify that the defendant Scardino was not present at a meeting in Dallas, as to which Mr. Acton testified, at

which Pioneer was discussed, or at any subsequent meeting at which Pioneer was discussed" (JA 1172).

Such testimony would have been merely cumulative, and therefore denial of the severance motion to permit Segal to testify to such facts was hardly prejudicial. *United States* v. *Thomas*, *supra*; *Byrd* v. *Wainwright*, *supra*. On cross-examination of Acton, Scardino's counsel inquired:

> Q. Was anything discussed at that [Dallas] meeting in Mr. Scardino's presence concerning a false scheme to manipulate stock? A. No, sir (JA 396).

And later:

> Q. Now, you testified yesterday, Mr. Acton, that your memory was that perhaps Mr. Scardino had been with you and Mr. Segal on more than one occasion at which Pioneer stock was mentioned, is that right? A. Yes sir.
>
> * * * * *
>
> Q. Would that be your testimony now, that you are not sure whether Mr. Scardino was at any of those meetings? A. Yes, sir.
>
> Q. But you can say with certainty, can you not, that at any meetings at which Mr. Scardino was present that no plan to defraud anybody was ever discussed in his presence?
>
> * * * * *
>
> A. Yes, sir (JA 397, 398).

During the cross-examination of Clegg, counsel elicited these responses to these questions:

> Q. Do you know how many meetings, at how many meetings you were present with Mr. Scardino and Mr. Segal, if any? A. I don't think there was—I don't remember specifically any, where they were both together.

> Q. Were you ever at any meeting with Mr. Scardino during that period of time at which was discussed in Mr. Scardino's presence any scheme to artificially raise the price of Pioneer stock?
>
> * * * * *
>
> A. No (JA 651).

Thus, Scardino had placed before the jury the same testimony from the Government's own witnesses which Scardino sought to elicit from Segal. Under these circumstances, there was no abuse of discretion in denying Scardino's motion to sever his trial from Segal.

Similarly, Scardino now claims prejudice when he record reveals that the proffered testimony of Zuber would have been merely cumulative. Scardino's claim that he was unaware of McKibbon's sale of stock was already before the jury in the testimony of both Acton and Clegg elicited on cross-examination.

> Q. Now, you also testified that at that meeting, Richard McKibbon admitted that he had sold these blocks of Pioneer stock and had kept the proceeds, is that correct? A. Yes, sir.
>
> Q. Did Mr. Scardino make any statement at that meeting that indicated he knew McKibbon had done that? A. No, sir.
>
> Q. Did Mr. Scardino make any statement that indicated he was surprised that that had happened? A. Yes, sir (JA 406).

And later, counsel adduced the following on cross-examination of Clegg:

> Q. And did you not testify earlier today that during the course of that telephone conversation Mr.

> Acton told you that Mr. McKibbon had confessed at that meeting that McKibbon had sold those shares without Mr. Scardino's knowledge and had kept the proceeds? A. Yes, he did (JA 659; see also JA 596).

In light of the fact that Zuber's proffered testimony would have been merely cumulative, Scardino incurred no prejudice from Zuber's unavailability—assuming Zuber would have declined to testify. Moreover, Zuber's testimony would have been incredible and therefore hardly probative, given Scardino's receipt of in excess of $14,000. Indeed, Scardino's theory that the $14,000 were proceeds from a loan was rejected because the Government proved that at most the loan arrangement called for him to receive a maximum of $7,500 (JA 412).

Scardino's final claim,* that denial of his severance motion resulted in prejudice because the trial court did not marshal the evidence, is entirely frivolous. The decision not to marshal evidence does not constitute error. *United States* v. *Nuccio*, 373 F.2d 168 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967), 392 U.S. 930 (1968); *United States* v. *Schor*, 418 F.2d 26 (2d Cir. 1969). Here the trial court explicitly declined to marshal the evidence because the court's charge immediately followed seven hours of summations (JA 1389). No exception was taken below.

2. *Zuber.* Zuber claims that denial of his motion for severance improperly deprived him of both Segal's and Finkelstein's testimony. These claims are without merit for a variety of reasons. First, Zuber, although later acquitted, was charged in the conspiracy count, which made joinder under Fed. R. Crim. P. 8(b) plainly appropriate. *United States* v. *Miley*, *supra*, 513 F.2d at 1209. Second, as in-

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* Scardino's claim with respect to "spillover" was treated in Point I, *supra*.

dicated above, this case involves precisely the situation anticipated in *United States* v. *Shuford, supra,* 454 F.2d at 777 n. 5, relied on by Zuber, where the burden on judicial administration and time warrant a joint trial.

The consideration of judicial economy is particularly significant in view of the minimum prejudice—if any—suffered by Zuber from denial of his severance motion. Zuber maintains that he was deprived of Segal's testimony. In his pre-trial papers, Zuber generally alleged that Segal's counsel had characterized Segal's possible testimony as "exculpatory" (Zuber's Brief at 22). Without more, that statement was plainly insufficient to satisfy Zuber's burden under *United States* v. *DeSapio, supra.* See, e.g., *United States* v. *Crisona, supra.* At trial, Zuber's counsel expanded, stating that Segal would testify (1) that Segal had no conversation with Zuber until after January 10, and (2) that Segal never had a telephone conversation with Clegg or Zuber at Clegg's house in California because Segal was not, as Clegg testified, in New York at the time (JA 1118). The record reveals that Segal's testimony on these matters would have been merely cumulative. Although Clegg testified that he had called Segal "[p]robably at his office in New York" some time between Christmas and New Year's, and that Zuber had talked to Segal (JA 593, 595), Gardner testified that Segal had been in Florida during that period except for four or five days (JA 818). In any event, there was ample opportunity for Zuber's attorneys to cross-examine Clegg concerning that phone call. A review of the transcript discloses that counsel chose not to pose a single question on that issue (JA 609-30, 668). Having not considered the point sufficiently important to inquire on cross-examination of Clegg, it can hardly be said that Zuber's inability to call Segal to testify on this point constitutes even a scintilla of prejudice.

Similarly, Segal's proffered testimony concerning Segal's first contact with Zuber would have had a *de minimis* impact on the Government's case below. First, Gardner testified that Segal's first meeting with Zuber was either in the end of December or at the beginning of January (JA 798, 802). Segal's testimony that it was January 10th merely confirms Gardner's testimony. Second, although counsel launched a broadside attack on Gardner's credibility (JA 804-15), no question was asked concerning the first meeting. Plainly, counsel did not consider Gardner's direct testimony sufficiently damaging on its details to require further inquiry. For these reasons, Zuber's claims of prejudice from a joint trial with Segal are frivolous. Moreover, as already indicated, there was inadequate showing that Segal would testify at a subsequent trial. *United States* v. *Kahn*, *supra*, 381 F.2d at 841.

Zuber next maintains that he was deprived of Finkelstein's testimony by reason of the joint trial. A point by point analysis of Finkelstein's proffered testimony reveals the inconsequential effect to Zuber's case:

a) That Finkelstein introduced Zuber to Pioneer. Exclusion of this statement is hardly prejudicial in view of its non-exculpatory nature. *United States* v. *Kahn*, 366 F 2d 259, 264, (2d Cir.), *cert. denied*, 385 U.S. 948 (1966); *Byrd* v. *Wainwright*, *supra*, 428 F.2d at 1020. Moreover, Gardner had already testified that Finkelstein had brought Zuber in for the Reno meeting and counsel so argued on summation (JA 797, 1258).

b) That Finkelstein advised Zuber the stock was free trading. This testimony would have been irrelevant in that Zuber was not charged with sale of unregistered stock.

c) That Finkelstein and Zuber discussed their belief that Pioneer was a viable company with valuable assets. Such testimony would have been merely cumulative in that

Zuber's counsel elicited similar testimony from Acton * and Clegg ** and argued "belief in the mine" as part of Zuber's defense on summation (JA 360, 668, 1253-54).

d) That there was never a discussion with Zuber in Finkelstein's presence that Pioneer stock was being manipulated or that there were fraudulent activities with respect to Pioneer, and that Zuber always demonstrated a state of mind in Finkelstein's presence that Zuber had no knowledge of any fraud with respect to Pioneer. Zuber's inability to call Finkelstein on these matters did not deprive Zuber of a fair trial in view of similar testimony which had been elicited from Acton and Clegg, in view of Finkelstein's prior testimony before the grand jury, and in view of the direct and circumstantial evidence against Zuber. First, Finkelstein's testimony would have been cumulative in light of counsel's cross-examination of Acton, when Acton testified that he had not told Zuber about any of Acton's conversations with Scandino or Segal concerning Pioneer (JA 351 *et seq.*). Moreover, Acton denied ever having had any conversation with Zuber concerning the charges contained in the paragraph "the Object of the Conspiracy" and denied ever having agreed with Zuber to pursue the object of the conspiracy (JA 379, 415-16). Similarly, on cross-examination, Clegg testified that Zuber "was not involved in any of the affairs of the company or the acquisitions or the management of the company" (JA 603-04). Clegg further testified that Zuber was not present at Clegg's meetings with Segal in Reno or Dallas

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* Q. Did you tell Mr. Zuber that you believed the mine was very valuable? A. Yes, sir.

* * * * *

Q. Did you have a conversation with Mr. Zuber at any time to the effect that the mine was a valuable asset? A. Yes, sir (JA 360).

** Q. Mr. Clegg, did you ever tell Mr. Zuber about the mine? A. I'm sure I did.

Q. Did you tell him of your hopes for its financial success? A. Yes, I'm sure I did (JA 668).

and that Clegg never told Zuber about those meetings (JA 614-17). Clegg, too, testified that he never agreed with Zuber to effect the object of the conspiracy (JA 629, 630). Since Acton and Clegg were at the heart of the conspiracy, any additional testimony from Finkelstein along similar lines would have been merely cumulative.

Second, had Finkelstein testified, Finkelstein's prior testimony before the grand jury on September 5, 1974 could have been used extensively and effectively on cross-examination so as to cause the jury to reject entirely Finkelstein's exculpatory statements with regard to Zuber. In that testimony, Finkelstein admitted:

> Q. Did Segal explain to you that he had controlled the market in Pioneer and was raising the price in the stock when the people out West sold the stock which caused the price to go down and hurt the market? A. He said he was controlling it. He controlled the stock.
>
> Q. He controlled the stock? A. Correct.
>
> Q. Were his words also that they had hurt the market as a result of what they did by selling the stock? A. Yes, plus they stole his money.
>
> Q. Plus they stole his money? A. Yes.
>
> Q. Did he claim that the stock that was sold by these people and the profits that were obtained belonged to him? A. He claimed that that stock was supposed to have been put into for a loan which would have never hit the market. And the fact that it was not put into the loan, it was sold. Naturally, when you put stock into the market it drops the price" (Finkelstein, Grand Jury 9/5/74, pp. 39-40).*
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> (See also Finkelstein, Grand Jury 8/13/74, p. 2).

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* These grand jury minutes were not admissible below because of *Bruton* v. *United States*, 391 U.S. 123 (1968), which precludes post-conspiratorial admissions of one defendant that implicate another co-defendant. At separate trials, no such *Bruton* problem would exist. The grand jury transcript is not part of the record, but is available upon request.

Indeed, that grand jury testimony could have been offered at a separate trial as affirmative evidence to prove the truth of the matter therein pursuant to Fed. R. Ev. 801 (d)(1). As this Court noted in *United States* v. *Rivera*, 513 F.2d 519, 526-27 (2d Cir. 1975) while the new rules of evidence became effective only as of June 1, 1975, they were permitted to apply at an earlier time absent a showing of injustice. With the introduction of this evidence, and given the joint activities of Zuber and Finkelstein in Pioneer stock, the jury would have had firm basis to infer that Finkelstein, indeed, had told Zuber about the full manipulative scheme, just as Segal had told him. See *United States* v. *Sullivan*, 498 F.2d 146, 151 (1st Cir.), *cert. denied*, 419 U.S. 993 (1974). The jury would likely have rejected his proffered testimony that he never discussed the manipulative scheme with Zuber as a recent fabrication, concocted to protect his friend Zuber and to protect Finkelstein himself, since he and Zuber were similarly situated and engaged in the same transactions in Pioneer. Certainly, the existence of this grand jury testimony undercuts Zuber's present claim that the joint trial deprived him of due process by reason of Finkelstein's unavailability. If anything, Zuber benefitted from the joint trial in that *Segal's* Sixth Amendment right kept this testimony from being offered against *Zuber*. Had this evidence been introduced, both Zuber and Finkelstein might well have been convicted of conspiracy as well.

Third, the direct and circumstantial evidence against Zuber was so overwhelming as to reduce any prejudice from Finkelstein's unavailability to harmless proportions. In addition to the proof already detailed concerning Zuber's "tough guy" role in the Reno "sit down", there was ample evidence uncontradicted by Finkelstein's proffered testimony that Zuber was possessed with the requisite knowledge of the fraud. Zuber and Finkelstein gave Grant stock in exchange for the fur coats, hardly the sort of transaction usually engaged in with a freely trading stock. At the ex-

change, Zuber made specific representations that it was "a very good stock, selling about $6 at the time" (JA 916). Grant repeated twice in his direct testimony that Zuber stated "they *intended it* [Pioneer stock] to go very high." (*Id.* emphasis added). That statement alone is sufficient proof, given the evidence in the case, that Zuber knew about the manipulative scheme. *United States* v. *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974). Further direct evidence of Zuber's guilty knowledge was the option agreement which permitted Zuber to buy back from Grant the 6900 shares of Pioneer at $10 within 60 days (GX 63B). That option worked the dual purpose of furthering Segal's scheme to keep Pioneer off the market and to induce Grant into believing that the stock would maintain its high value and possibly even reach $10 within 60 days. Indeed, Grant testified that he relied on the representation and inducement in the option when he entered the agreement to exchange the fur coats for the stock (JA 917-18). Neither Zuber nor Finkelstein told Grant that Pioneer was not in operation (JA 926). Through these deceptive and fraudulent representations and material omissions, Grant was deceived into selling fur coats at a loss of approximately $15,000.

Nothing that appears in Finkelstein's affidavit would controvert this direct and circumstantial evidence against Zuber. Accordingly, there was no prejudice nor was there any abuse of discretion in denying Zuber's motion to sever.

At trial, Zuber's counsel made further representations as to what Finkelstein would testify if called as a witness; these matters are subject to the same deficiencies. Counsel stated that Finkelstein would testify that Gardner contacted Finkelstein to collect money and that Finkelstein told Zuber they were going to collect money (JA 1119). Counsel had already succeeded through cross-examination of Acton to establish that the purpose of the trip to Reno was "to get the money back" (JA 356). On cross-exam-

ination of Clegg, counsel established that Zuber went to see Clegg at Segal's behest "to collect the money" (JA 590). There is thus nothing of inherent value in Finkelstein's proposed testimony that Zuber had not already elicited for the jury. Moreover, as noted above, Finkelstein's grand jury testimony would have contradicted the extent to which the entire scheme had been explained to him, and that testimony could have been offered at a separate trial.

In this regard, counsel's next representation that Finkelstein would testify "that at that Reno meeting there were no threats" (JA 1119) runs directly counter to Finkelstein's grand jury testimony of September 5, 1974. Finkelstein there testified:

> "Q. In fact, was Zuber rough on McKibbon in his demands that the money be repaid? A. He is always rough in his ways.
>
> Q. This is no exception? A. That is correct.
>
> Q. Specifically, do you recall that Zuber pushed McKibbon on the bed in the motel room? A. Yes, I do" (Finkelstein, Grand Jury 9/5/74, pp. 38-39).

That testimony would have been available to the prosecution for use on cross-examination had Finkelstein testified there were no threats. In any event, Zuber's counsel had ample opportunity to cross-examine Acton concerning Zuber's conduct at the Reno meeting. On cross-examination, the question of threats did not arise; indeed, any testimony of threats is somewhat insignificant in view of the testimony that Zuber actually choked McKibbon (JA 355).

Nor is there anything exculpatory concerning counsel's representations that Finkelstein would testify that McKibbon was being evasive (JA 1120). *United States* v. *Kahn, supra,* 366 F.2d at 264. In any event, Clegg testified about this very point, "that McKibbon kept lying and lying . . ." (JA 597). The suggestion that Finkelstein would testify that

"there were no guns" at the Reno meeting (JA 1120) is hardly more than cumulative in light of Acton's response to counsel's question:

> Q. There were guns displayed in this meeting?
> A. Not that I saw (JA 356).

Accordingly, Zuber was in no way prejudiced from the denial of his motion for severance. Indeed, he was the beneficiary of the joint trial in that evidence bearing on his knowledge and participation in the conspiracy was excluded by virtue of his *co-defendant's* right to confrontation. Zuber's severance claims therefore do not rise to the level of denial of due process found in the *Shuford, Echeles, Martinez, Byrd* and *Kelly* cases, cited above.

POINT IV

The Trial Court Properly Denied Appellants' Motions To Dismiss The Indictment For Pre-Indictment Delay Because The Delay Was Not Unreasonable And Appellants Suffered No Prejudice Thereby.

Segal, Scardino and Zuber all claim that the indictment should have been dismissed because the indictment was filed "more than four and one-half years after the last overt act alleged to have been committed in furtherance of the conspiracy" (Segal's Brief at 58). Each appellant claims that the delay resulted in undue prejudice to his defense. These claims are without merit.

Appellant Zuber's reliance on the Sixth Amendment and Rule 48(b) of the Federal Rules of Criminal Procedure is misplaced in that neither applies to situations where the delay occurs between the commission of the crime and the filing of the indictment. Rather, as the Supreme Court has indicated,

> "'. . . it is doubtful that Rule 48(b) applies . . . where the indictment was the first formal act in the criminal prosecution.
>
> * * * * *
>
> The rule is clearly limited to post-arrest situations.
>
> * * * * *
>
> [T]he Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event that occurred in this case only when the appellees were indicted. . . ."

United States v. *Marion*, 404 U.S. 307, 312 n. 4, 319, 313 (1971). This Circuit is in accord that Fed. R. Crim. P. 48(b) does not apply until after arrest or indictment. *United States* v. *Ianelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972). *See also United States* v. *De Tienne*, 468 F.2d 151, 156 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973). Similarly, this Circuit has concurred that the Sixth Amendment's speedy trial provision attaches only after the formal initiation of a prosecution. *United States* v. *Feinberg*, 383 F.2d 60, 65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). Here there was no arrest; the first formal act in the instant prosecution was the filing of the indictment on September 24, 1974. The trial itself commenced December 2, 1974 (JA 4). Thus there was no prejudicial delay for purposes of either the Sixth Amendment or Rule 48(b).*

The above-cited cases further agree that where the claim involves pre-indictment delay, it is the applicable statute

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* It should be noted that even if Rule 48(b) and the Sixth Amendment were to apply, reversal would still be inappropriate since Zuber has failed to show that the trial court abused its discretion in denying his motion to dismiss. *United States* v. *Cartano*, 420 F.2d 362 (1st Cir.), *cert. denied*, 397 U.S. 1054 (1970); *York* v. *United States*, 389 F.2d 761 (9th Cir. 1968).

of limitations "which remains the primary yardstick for measuring pre-accusation delays to prevent possible prejudice." *United States* v. *De Tienne, supra,* 468 F.2d at 156; *United States* v. *Feinberg, supra,* 383 F.2d at 65. In the instant case, the statute of limitations was five years, 18 U.S.C. § 3282, and it is uncontested that the prosecution was commenced within that period.

Appellants' remaining claim is that even though the prosecution was commenced within the relevant five year period, the delay of four and one-half years resulted in prejudice to their defenses causing them to be denied a fair trial. This claim, founded on the precepts of Due Process, must also fail because appellants have not even argued, much less demonstrated, that they have met the two-tier requirement of the Fifth Amendment as established by the cases. According to the Supreme Court, "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [the defendants'] rights to a fair trial *and* that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion, supra,* 404 U.S. at 324 (emphasis added). Appellants' argument of prejudice without further complaining that the prosecutor intentionally sought to obtain tactical advantage is therefore deficient on its face. On two occasions, this Circuit has recently recognized that some allegation of prosecutorial misconduct in failing to promptly seek an indictment must be alleged and proved in order to justify dismissal of an indictment filed within the statutory period. *United States* v. *Frank,* Dkt. No. 74-2639 (2d Cir., June 27, 1975), slip op. at 4446; *United States* v. *Brown,* 511 F.2d 920, 923 (2d Cir. 1975).

Even if an allegation were made that there was prosecutorial misconduct, such a claim could not prevail on the record in this case. The SEC itself conducted extensive proceedings concerning Pioneer stock, commencing in De-

cember, 1970. The proceedings included the issuance of an injunction in the Spring of 1971 and reference of the matter to the Department of Justice in December, 1971. Assistant United States Attorney John Walker was assigned to this matter in late Spring, 1972; but his initial investigation was interrupted by his involvement in two lengthy trials. In the fall of 1973, Mr. Walker recommenced the investigation, including the direct questioning of appellant Segal with counsel's permission. The case was presented to the grand jury in the final months of 1973. After another interruption due to another trial in the spring of 1974, the grand jury proceeding resumed in the summer of 1974. The indictment was filed on September 24, 1974 (JA 96-101). The deliberate pace in the intervening years was therefore hardly the result of any attempt to gain a tactical advantage, but rather an admixture of ordering priorities and careful investigation. As this Court noted in *United States* v. *DeMasi*, 445 F.2d 251, 255 (2d Cir.), *cert. denied* 404 U.S. 882 (1971), "'careful investigation, even at the price of delay, is to be cherished, inasmuch as '[t]ime-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons'." Indeed, in this case the SEC named at least one defendant in the civil action who the grand jury determined to not indict on the basis of the evidence of his involvement (JA 97). Moreover, Zuber and Finkelstein were not named in the civil action but both were indicted and convicted below. (*Id.*).

Both the nature and scope of the fact pattern herein warranted the two and one-half year delay by this office after its reference from the SEC through the Department of Justice. There were originally nine defendants named in forty-six counts charging a conspiracy that lasted two years. There were nationwide transactions, and witnesses as well as defendants resided throughout the county. The delay was a corollary to extensive investigations required to unravel the conspiracy which the defendants had woven.

This is precisely the kind of delay which this Court has repeatedly sanctioned. "[T]ime is needed for investigation and determination of the need for and extent of criminal charges to be brought, particularly in wide-ranging securities distribution schemes. This is recognized by the Congress in the statute of limitations, to which we normally look to determine the period open to the prosecution to bring its formal accusations." *United States* v. *Parrott*, 425 F.2d 972, 975 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970).

By the same token, appellants have failed to demonstrate the requisite "substantial prejudice" as a result of the delay to warrant dismissal of the indictment. *United States* v. *Brown*, *supra*, 511 F.2d at 922.* The prejudice here is alleged to arise out of the four and one-half year period between commission of the crime and indictment. Plainly there is no inherent prejudice in a four and one-half year delay. *United States* v. *Schwartz*, 464 F.2d 499 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972), permitting a five year delay; *United States* v. *DeMasi*, *supra*, permitting a four year delay; *United States* v. *Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972), allowing a delay of nearly four years; *United States* v. *Feinberg*, *supra*, permitting a delay of four years and eleven months; and *United States* v. *Frank*, *supra*, permitting a delay of four years eight months. Therefore, it is necessary to analyze

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* It is clear that it is appellants' burden to show substantial actual prejudice. *United States* v. *Marion*, *supra*, 404 U.S. at 325; *United States* v. *Frank*, *supra*. Appellant Zuber's reliance on language in *Dickey* v. *Florida*, 398 U.S. 30, 53-54 (1970), to the effect that a defendant need not show prejudice, is entirely misplaced. First, that language appears in Mr. Justice Brennan's concurring opinion, in which only Mr. Justice Marshall joined. Second, the author himself noted that his concurrence was merely "comments [which] provide no definite answers." *Id.* at 56. Third, *Dickey* involved a seven year delay between *arrest* and *trial*, not a pre-indictment delay.

the effect of the delay in this case in terms of the alleged prejudice as to each appellant.

1. Segal. Segal's principal claim is that a "due diligence" file upon which he relied was not preserved intact and was only partially available at trial.

Schiffman testified that he gave Azzerone the "due diligence" file (JA 462). Azzerone in turn testified that he gave the SEC all material in his possession on Pioneer, including the "due diligence" file (JA 532). There was no proof that the SEC did not turn over the entire "due diligence" file to the United States Attorney's office, and the Government does not concede that the "due diligence" file ever consisted of anything more than Government Exhibits 6A and 6B.

In any event, Segal has never demonstrated that the "due diligence" file was anything more than a sham. There is no reason to suspect that it ever contained substantial or exculpatory material. The testimony concerning its contents is limited to Azzerone (a "financial statement") and Schiffman (a mining report) (JA 531, 461). Counsel made little attempt to explore the contents of the "due diligence" file; indeed Schiffman's suggestion that there may have been an additional quarter or half inch of papers was left unexplored (JA 461 *et seq.*). Even if the "due diligence" file did contain additional matter to Exhibits 6A and 6B, there is evidence that the "due diligence" file would not be exculpatory. Schiffman testified that he told Segal that, on the basis of all the information he had been given, including the "due diligence" file, there was no proof of the value of the assets which Pioneer owned at the time or which it intended to acquire (JA 427-29).

Moreover, the "due diligence" file is in large part irrelevant to the charges in the indictment. The proof below is that Segal had commenced selling stock in Pioneer as early as October 30, 1969. The Lone Tree Mine was not formed

until November 20, 1969 and the conspirators did not purchase the mine until December 3, 1969 (JA 431, 694, 277; GX 7, 9, 101). Consequently, even if there were a "due diligence" file, that file would be irrelevant since the mine did not become an asset of Pioneer until six weeks after Segal had commenced trading in Pioneer. Thus, Segal was fraudulently selling unregistered stock before the mine was either formed or acquired.

Segal's next claim, that the hazy recollection of government witnesses caused him to suffer prejudice, is patently frivolous. As the Supreme Court wrote in *United States* v. *Ewell*, 383 U.S. 116, 122-23 (1966) "the problem of delay is the Government's, too, for it still carries the burden of proving the charges beyond a reasonable doubt." If anything, the appellants below were "probably helped as much as hurt by any memory lapses." *United States* v. *Stein*, 456 F.2d 844, 849 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972). The Government witnesses were all available for exhaustive cross-examination as to their recollection, which was effectively conducted by all counsel. Moreover, Schiffman, Clegg, Azzerone, Karfunkel and Zahl had all testified during the earlier SEC investigations when their memories were still fresh. Their testimony was available in the form of 3500 material, and in counsels' possession for purposes of cross-examination (GX 3507, 3516, 3523, 3524, 3539, 3540, 3545, 3546).

Segal's final claim, that during the delay Eddie Levine had died, is also without significance. In the first place, Segal made no showing that greater speed by the United States Attorney's office in bringing the indictment would have preserved Eddie Levine's testimony. Indeed, the grand jury testimony of Eddie Levine's father, Jack Levine, discloses that Eddie Levine died in 1971, three years before the indictment, prior to reference of this case to the Department of Justice from the SEC. Second, it is evident from

the proof below that Eddie Levine's testimony would hardly have been exculpatory and in any event could only have gone to a very limited aspect of the Pioneer fraud. And, if anything, Eddie Levine's death made the Government's burden more difficult to meet. This Court should not substitute its judgment for the experienced trial judge who determined no prejudice resulted from this unforseen event, when the trial court had "ample opportunity, after a fairly lengthy trial and hearing the testimony of the many witnesses, to appraise the claims of prejudice." *United States* v. *Quinn*, 445 F.2d 940, 943 (2d Cir.), *cert. denied*, 404 U.S. 850, 945 (1971).

2. *Scardino.* Scardino raises the separate claim of prejudice that, during the period of delay, his home and business had been burglarized or burned (JA 246). Scardino, however, offered no proof that the burglary or fire resulted in loss of relevant papers, much less that any papers that existed were exculpatory in nature. Indeed, the trial court offered Scardino the opportunity to hold a post-trial hearing to assess the nature of the alleged loss of papers (JA 247). At the conclusion of the trial, counsel for Scardino did not request the hearing, and the claim was thereby waived.

3. *Zuber.* Zuber's claims of hazy recollections does not differ from Segal's, which have already been treated. At most they constitute "the possibility of prejudice. No actual prejudice is established." *United States* v. *Foddrell*, Dkt. No. 75-1048 (2d Cir., July 28, 1975), slip op. at 5162. Zuber's claim of prejudice as a result of the alleged loss of part of the "due diligence" file is difficult to fathom. There is no evidence that Zuber ever saw or heard of the "due diligence" file prior to trial. Therefore, it is frivolous to argue that he was prejudiced by its alleged loss. In any event, the jury had already received evidence that Zuber had been told of the mine's potential by Clegg and Acton, reducing the harm to Zuber from the file's unavailability to harmless proportions (JA 360, 668).

POINT V

The Injunction Was Properly Received In Evidence On Redirect Of Schiffman And Appropriate Limiting Instructions Were Given.

It is settled that the scope of redirect examination is committed to the sound discretion of the trial court and reversal is warranted only upon a showing that such discretion has been grossly abused. *United States* v. *Kahn*, 472 F.2d 272, 281, (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Hodges*, 480 F.2d 229, 233 (10th Cir. 1973); see also *Chapman* v. *United States*, 346 F.2d 383, 388 (9th Cir.), *cert. denied* 382 U.S. 909 (1965); *United States* v. *Pfingst*, 477 F.2d 177, 193 (2d Cir.), *cert. denied* 412 U.S. 941 (1973). A finding of abuse of discretion requires that there be a substantial injury to a defendant's rights before a judgment will be reversed. *Lowe* v. *United States*, 389 F.2d 108, 112 (8th Cir.), *cert. denied*, 392 U.S. 912 (1968).

Segal contends that the introduction of the New York State civil injunction against him was not warranted and, as such, constituted reversible error. Segal claims that the witness Schiffman's testimony on cross-examination was not such as to permit the Government to introduce the text of the civil injunction. On cross-examination, Segal asked Schiffman:

> Q. Now, with respect to the use of nominees by Mr. Segal, did Mr. Segal in the fall of 1969 explain to you that he used nominees because of the problem of claims of creditors that might levy against assets in accounts under his own name? A. Yes.
>
> Q. Thank you (JA 470-71).

On redirect examination, the Government introduced the civil injunction on the grounds that Schiffman's statements

regarding the use of nominees had opened the door for its introduction (JA 476-78). Segal's claim that, because Schiffman never testified that he had discussed the injunction with the defendant, it was error to receive it into evidence is totally without merit.

Segal's questions to Schiffman concerning the use of nominees were calculated to imply that Segal had used them only to avoid the claims of creditors against his assets. He was thus attempting to leave a false and incomplete impression with the jury that he had no illicit reason to use nominees, other than to escape creditors. This case is therefore analogous to *Vause* v. *United States*, 53 F.2d 346, 352 (2d Cir.), *cert. denied* 284 U.S. 661 (1931) where this Court wrote:

> "The direct examination merely disclosed the loan. That was certainly harmless. The cross-examination led up to the point where the defendant's attorney virtually challenged the district attorney to have the loan explained if he dared. Under these circumstances, the government had to let the matter remain as a subject somewhat veiled in mystery and let it be implied that there was something in it disadvantageous to its case or bring the facts to light. It chose the latter course, and, if it proved to be somewhat of a boomerang to the defendant, there is no help for it now, for the government was not bound to let the defendant bring out only what he pleased and be content itself with no more. *Cohen* v. *United States*, (C.C.A.) 157 F. 651."

See also *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir. 1975). The doctrine of completeness extends beyond permitting the introduction of the remaining portion of a document or conversation; it permits, on redirect, a full exploration of a matter "to the extent that it relates to the same subject

matter." *Harrison* v. *United States*, 387 F.2d 614, 615 (5th Cir. 1968); See also *Zacher* v. *United States*, 227 F.2d 219, 227 (8th Cir. 1955), *cert. denied*, [illegible] U.S. 993 (1956); *United States* v. *Davis*, 262 F.2d 871, 876 (7th Cir. 1959); *Kovalchuk* v. *United States*, 176 F.2d 873, 878 (6th Cir. 1949). See also Wigmore, Evidence, (3d ed.) §§ 2094, 2104, 2113, 2119, 2120 (1940). Thus the Government had a right and a duty to explain Schiffman's testimony concerning Segal's use of nominees, and the trial court was obligated "to prevent limitation of evidence to warp the truth and confuse the jury." *United States* v. *Appuzo*, 245 F.2d 416 422 (2d Cir.), *cert. denied*, 355 U.S. 831 (1957). Certainly, it was within the trial court's discretion to permit the Government to "complete" and explain Schiffman's testimony regarding nominees. *United States* v. *Hodges*, *supra*. The sole reason the injunction was introduced into evidence was to counteract Segal's "innocent" claim that nominees had been used to avoid the claims of creditors. The Government had the right to do this, so that the jury could be aware of the full story.

Segal's assertion that the injunction was not validly receivable through Schiffman because Schiffman "did not connect it in his testimony to any conversation with defendant about nominees" (Segal's Brief at 48) is also groundless. First, Schiffman testified that he himself had acted as a nominee for Segal (JA 420-21). Second, it would be irrelevant if Schiffman made no such connection; it does not matter how much Schiffman himself knew of the true reason behind the use of nominees; all that is important to this issue is the state of *Segal's* own intentions as to the use of nominees, and the fact that Segal's own "explanation" of the use of nominees was only half the story. Further, the Government was not limited to using only Schiffman to introduce the injunction. Once the cross-examination of Schiffman had opened the way for questions relating to Segal's use of nominees, the injunction was admissible through any witness. Since Exhibit 131 was a certified copy of the injunction, Segal's claim that Schiffman was the in-

correct witness through which to offer the injunction must necessarily fail.

Segal's claim of prejudice resulting from the admission of the injunction is also unfounded. In accordance with Segal's request to charge (JA 1629), the trial court gave the jury the following instructions:

> "Now, the government has introduced evidence of a civil injunction which was entered into a state court in 1959 which barred the defendant Segal from engaging in the business of buying and selling securities. This injunction was not a conviction of any crime whatever and it was purely civil in nature. Mr. Segal is not charged in this case with having violated that injunction. The injunction is offered solely to establish that Mr. Segal may have used nominees because of the injunction.
>
> You are not to consider the injunction as evidence on any other issue in this case" (JA 1393-94).

Clearly these limiting instructions removed any possibility of prejudice that might have accompanied the introduction of the injunction. "[A] clear instruction not to consider evidence by the trial judge generally eliminates any reversible error." *United States* v. *Vosper*, 493 F.2d 433, 438 (5th Cir. 1974); see also *United States* v. *Bynum*, *supra*, 485 F.2d at 503; *United States* v. *Gillette*, 383 F.2d 843, 849 (2d Cir. 1967); *United States* v. *Stromberg*, 268 F.2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). In *Hurst* v. *United States*, 337 F.2d 678, 680 (5th Cir. 1964), a case on which appellant Segal heavily relies, such instructions were not given by the trial court.

Segal also attacks the argument about the injunction made by the Government's attorney in his summation (Segal's Brief at 42). It has long been recognized that a certain degree of latitude must be allowed to an attorney

in summation as long as he confines his statements to the evidence or such reasonable inferences as may be drawn from the evidence and does not make misleading or unfairly prejudicial claims. *United States* v. *Angelet*, 231 F.2d 190, 192 (2d Cir.), *cert. denied*, 351 U.S. 952 (1956); *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968); *United States* v. *Brown*, 456 F.2d 293, 295 (2d Cir.), *cert. denied*, 407 U.S. 910 (1972); *United States* v. *Hager*, 505 F.2d 737, 740 (8th Cir. 1974). It is apparent that the Government's attorney stayed well within the boundaries of permissible inference to be drawn from Segal's use of nominees and their connection to the civil injunction (JA 1333, 1334, 1338). The Government's attorney correctly limited his reference to the injunction to the purpose for which it was introduced—namely, that Segal used nominees for the purpose of circumventing the injunction. At no time did the Government's attorney state that Segal violated the terms of the injunction.

In any case, the circumstances were such that little prejudice to the defendant Segal could have arisen from the prosecutor's statements. The jury was not limited to the Government's attorney's interpretation of the injunction, as it was read to them upon its introduction (JA 478) and, it was available for them to examine in the jury room. *United States* v. *Parker*, 491 F.2d 517, 521 (8th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974); *see Dallago* v. *United States*, 427 F.2d 546 (D.C. Cir. 1969). Furthermore, the trial court explicitly instructed the jurors that they were to consider the evidence themselves and did not have to accept the lawyers' review of the evidence (JA 1231). Therefore, regardless of what the prosecutor said in his summation regarding the injunction, the jury was aware that it was free to accept or reject his interpretation of the injunction. There can consequently be no valid claim of prejudice resulting from the Government attorney's summation.

Segal's final claim, that the prosecutor misstated the terms of the injunction, is patently frivolous. In view

of the broad language used in the injunction (JA 1544-47), the prosecutor's statement that the defendant had been prohibited from "transacting in securities" was entirely justified and applicable. The defendant should not be permitted to employ a semantic argument to escape the justice of the courts.

The weight of the evidence being as it was, any error resulting from the introduction and interpertation of the injunction is, at most, harmless. *Lampe* v. *United States,* 229 F.2d 43, 46 (D.C. Cir. 1956), *cert. denied,* 359 U.S. 929 (1959); *Butler* v. *United States,* 138 F.2d 977, 980 (7th Cir. 1943); *Gresham* v. *United States,* 374 F.2d 389 (8th Cir. 1967); *United States* v. *Mancino,* 468 F.2d 1350 (8th Cir. 1972).*

POINT VI

The Statements Of Eddie Levine Were Properly Admitted. Any Conceivable Error Was In Any Event Harmless As To All Except Four Counts.

Segal asserts that the hearsay testimony of statements attributed to Eddie Levine, an alleged unindicted co-conspirator, and the testimony of other witnesses linked to Eddie Levine, should have been stricken from the record because Levine was not shown to have been a member of the conspiracy proved at trial.

Eddie Levine, the deceased son of defendant Jack Levine, worked for Abner Berman in the fabric industry. Eddie

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* It is noteworthy that Segals' own explanation for his use of nominees is, itself, somewhat fraudulent. The explanation that Segal used nominees to avoid the claims of his creditors hardly supports his claim of innocence and good faith. The introduction of the injunction therefore cannot be regarded as creating prejudice in the jury's mind when chances were good that Segal's explanations had already caused him some prejudice.

Levine told Berman "that his father and some other gentleman were in on some stock deals and that this stock will earn over $2 a share on dividends within a few weeks" (JA 895). Eddie Levine told Berman that others were buying the stock in Pioneer and that the company was building mobile homes. (*Id.*). Relying on these representations, Berman entered the market in Pioneer and then sold out at a small profit; only to be confronted by Eddie Levine, who told Berman he was "very, very foolish because the stock is going to go up tremendously" (JA 896-97). Berman then purchased additional shares of Pioneer, losing more than $14,000 (JA 897, 898, 900).

Berman, in turn, spoke to Meyer who purchased an initial block of 1200 shares of Pioneer. In December, when Meyer sought more information concerning Pioneer, Berman referred Meyer to Segal (JA 846-47). On the basis of a meeting with Segal and Jack Levine, Meyer purchased additional shares of Pioneer. In reliance on the misrepresentations that the value of Pioneer would increase, Berman lost in excess of $30,000 (JA 859, 861).

Meyer, meanwhile, had recommended Pioneer to Howard Nerenberg, who lost in excess of $10,000 as a result of his purchases (JA 957-62).

Sol Fingar, like Berman, purchased 3,000 shares of Pioneer "on the recommendation a young fellow named Eddie Levine" (JA 767). Eddie Levine told Fingar that "it was a mining stock and that it would go up" (JA 768). Eddie Levine further promised Fingar that "some literature" on Pioneer "would be coming out" but none was ever received by Fingar (JA 769). In all Fingar lost in excess of $22,000 on worthless Pioneer stock (JA 766, 770).

Segal claims that the trial court incorrectly denied his motion to strike all testimony relating to Eddie Levine's statement. Segal argues that the statements are hearsay

and the only link between Eddie Levine to the conspiracy is through Jack Levine, and since Jack Levine was acquitted, Eddie Levine could not be a co-conspirator. Segal's claim must fail for several reasons. First, Eddie Levine's statements to Sol Fingar and Abner Berman were not hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Ev. 801(c) (July 1, 1975).* Both Berman and Fingar testified that Levine had told them about the interest shown by others in Pioneer stock and had touted the stock's imminent increase in value (JA 986-97, 768). These statements, however, were not offered by the Government to "prove the truth of the matter asserted." See *United States* v. *Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States* v. *Moore*, 505 F.2d 620, 624 (5th Cir. 1974). Levine's statements were offered as a "verbal act," only to show that they were made to Berman and Fingar. Consequently, the statements do not constitute hearsay. Wright, Federal Practice and Procedure—Criminal § 412 at p. 142 (1969); McCormick, Evidence, §§ 246, 249 (2d ed. 1972).

Further, notwithstanding Jack Levine's acquittal, the statements of Eddie Levine were properly admitted as the statements of a co-conspirator in furtherance of the conspiracy. *United States* v. *Cafaro*, 455 F.2d 323 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972). In *Cafaro*, Judge Moore wrote that although a co-defendant had been acquitted on the conspiracy charges at the close of the Government's case, the hearsay declarations of the absolved co-defendant were properly admitted against appellant because "there can be no doubt as to [the absolved co-defendant's] extensive participation in the conspiracy." *Id.* at 326. Here the proven acts of Eddie Levine were independent, and outside the presence of Jack Levine, and evidenced Eddie Levine's

* These rules were not applicable at the time of trial, but this definition only codifies existing law.

own contributions in furtherance of the scheme. Thus, the fact that the trial court entered a judgment of acquittal with regard to Jack Levine at the close of the Government's case in chief (JA 1133-37) does not effect the validity of the court's finding that the evidence sufficed to establish that Eddie Levine was a member of the alleged conspiracy (JA 1171). Eddie Levine's verbal acts in conversations with Berman and Fingar amply support the court's finding. Moreover, even assuming that Jack Levine's acquittal somehow suggests an absence of criminal intent on Eddie Levine's part as well, it is plain that a defendant can be convicted for causing a crime to "be performed through an innocent dupe." *United States* v. *Bryan*, 483 F.2d 88, 92 (3d Cir. 1973) (*en banc*); *accord, United States* v. *Miller*, 246 F.2d 486 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957); *United States* v. *Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). Indeed, the agency theory which permits co-conspirator's testimony originated in civil cases and extends to situations where the declarant has been acquitted of conspiracy charges. *United States* v. *Zane*, 495 F.2d 683, 692 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). Thus, no matter how innocent Jack and Eddie Levine may have been, there was ample evidence to permit the jury to infer that Eddie Levine's statements were made as an agent of Segal and the conspirators in furtherance of their scheme to defraud innocent investors.

Finally, even if Eddie Levine's statements were inadmissible hearsay, their introduction as evidence was, at most, harmless error as to all counts except Counts 17, 18, 19, 23. Fed. R. Crim. P. 52(a). As the Supreme Court has written:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but a very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm, or a specific command

of Congress." *Kotteakos* v. *United States*, 328 U.S. 750, 764-65 (1964).

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

The Supreme Court has applied the harmless error rule even to hearsay statements admitted in violation of *Bruton* v. *United States*, *supra*, when the erroneously admitted testimony is "merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." *Brown* v. *United States*, 411 U.S. 223, 231 (1973); see also *Harrington* v. *California*, 395 U.S. 250 (1969). The Eighth Circuit decision in *United States* v. *Mancino*, *supra*, 468 F.2d at 1352 is closely on point with the instant case. There, the Court held:

> "We have concluded that, even assuming that the testimony Mancino objects to was impermissible hearsay because Bryant was not a co-conspirator and because the questioned statements were made outside of Mancino's presence, a question we do not here decide, the admission of the questioned evidence was harmless beyond a reasonable doubt." [citations omitted.]

The trial record here is replete with evidence of Segal's willful involvement in the conspiracy. The testimony of Acton, Azzerone, Clegg, Schiffman, Zahl and Gardner provide ample support for a reasoned finding of guilt on the conspiracy count. Indeed all Counts except 17, 18, 19, 23 and 28 were proved by evidence entirely distinct from Eddie Levine's involvement. And as to Count 28, the uncontroverted testimony was that Meyer purchased those 100 shares after direct conversations with Segal.

Thus, where the challenged utterances pertain only to four counts, where the utterances were the subject of only three witnesses' testimony, where they pertained to less than thirty pages of testimony in a trial that consumed nine days, thirty two witnesses, three hundred and thirty exhibits and over one thousand pages of transcript, it is clear beyond any doubt that the challenged utterances were not "the weight that tipped the scales against [Segal]". *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949).

POINT VII

Segal's Cross-Examination Of Clegg Was Not Unduly Restricted.

Segal asserts that the trial court's curtailment of his cross-examination of the witness Clegg concerning Clegg's conviction on thirteen counts of wire fraud was erroneous. Segal claims that Clegg's credibility was a key issue of fact for the jury, and that he suffered prejudice from not being permitted to examine in detail the circumstances behind Clegg's conviction in order to more completely impeach Clegg's testimony. On cross-examination, Segal's attorney asked Clegg:

> Q. Mr. Clegg, on April 26, 1974, were you found guilty on 13 counts of wire fraud by a federal jury sitting in Houston, Texas. A. Yes.
>
> Mr. Doyle: Your Honor, may I amend that question to March 28, 1974, with respect to the verdict?
>
> The Witness: Yes.
>
> Q. And on April 26, 1974, were you sentenced to serve a total of five years imprisonment in connection with that wire fraud? A. That is correct.
>
> Q. Did that wire fraud involve the sale by you of black boxes or blue boxes consisting of apparatus to obtain free long distance telephone service from the Telephone Company? A. No.

Q. What did that conviction involve?

Mr. Walker: Objection, your Honor.

The Court: Sustained.

Q. Are you presently out on bond pending appeal?

A. That's correct.

Mr. Doyle: Nothing further, your Honor (JA 647-49).

Segal's claim of prejudice must fail for several reasons.

First, the scope of cross-examination is within the trial courts discretion, and reversal will result only upon a showing of abuse of that discretion. *United States* v. *Pacelli,* Dkt. No. 75-1149 (2d Cir., July 24, 1975), slip op. at 5090-91; *United States* v. *Jenkins,* 510 F.2d 495, 500 (2d Cir. 1975). Furthermore, while there are cases that allow cross-examination for impeachment purposes into the "time and place of conviction, the nature of the offense, and the punishment imposed," *United States* v. *Miller,* 478 F.2d 768, 770 (4th Cir. 1973); *Beaudine* v. *United States,* 368 F.2d 417, 421 (5th Cir. 1966), there is also abundant authority that holds that a detailed inquiry into the crime can be, and very often must be, limited by the trial court:

> "We cannot see that any of this detail was relevant to the charge on trial; it went far beyond what was necessary to establish a criminal conviction for the purpose of impeaching credibility. Its obvious purpose and effect was to do more than to impeach defendant's credibility—it was intended to show that he was a dangerous criminal. Although the degree to which counsel may dwell on a particular point is within the discretion of the trial judge it seems to us here that this discretion was not wisely exercised."
>
> *United States* v. *Tomaiolo,* 249 F.2d 683, 687 (2d Cir. 1957).

The *Tomaiolo* decision was cited with approval by the Fourth Circuit, in a case similar to this appeal in which the *defendant's* attorney sought to examine in detail a Government witness' prior conviction:

> "In his effort to impeach Mullin, defendant's counsel cross-examinated Mullin about prior convictions. He was allowed to elicit the offenses themselves and, in several instances, he brought out the date of the conviction and the punishment. He complains, however, that he was not permitted to probe in depth the nature of the felonies, when they occurred, and their details. The limitations which the district judge imposed were not erroneous." (citations omitted)
>
> *United States* v. *Samuel*, 431 F.2d 610, 613 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971).

See also *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Plante*, 472 F.2d 829, 832 (1st Cir.), *cert. denied*, 411 U.S. 950 (1973); *United States* v. *Dow*, 457 F.2d 246 (7th Cir. 1972); *United States* v. *Mitchell*, 427 F.2d 644 (3d Cir. 1970); Wright, Federal Practice and Procedure—Criminal § 416 at p. 193 (1969). Thus, the trial court was well within its discretion when it permitted Segal's attorney to introduce the fact of Clegg's earlier conviction but did not allow further inquiry into the details of the conviction.

Secondly, it is questionable as to whether the trial court's limitation on Segal's cross-examination of Clegg caused any noticeable prejudice. As Segal asserts in his brief, the issue of Clegg's credibility was important to the appellant's defense. Yet, this credibility question had already been thoroughly raised for the jury's consideration. In addition to the conviction for wire fraud and five year sentence in Texas, Clegg had also told the jury that he had pleaded guilty to Counts One and Two of the present indict-

ment (JA 537), a fact that was thoroughly explored by appellant Zuber's attorney on his cross-examination of Clegg (JA 604-07). Further, as Segal notes in his brief (p. 61), Clegg's credibility had already suffered a substantial loss when it was shown on that Clegg had lied on cross-examination when he denied that he sold one thousand shares of Pioneer stock that were registered in the name of Jay Walker (JA 644; 12). Thus, testimony as to Clegg's prior conviction was merely cumulative evidence on the issue of his credibility.

The issue of the credibility of witnesses was fully explained in the trial court's instructions to the jury, including the traditional accomplice witness charge (JA 1390-93). The jury was therefore again reminded that Clegg's credibility was to be examined with special care.

Finaly, the trial court permitted Segal's attorney to question Clegg as to the general facts of his prior conviction. The court even permitted Segal's counsel to specifically inquire whether Clegg had *sold* electronic apparatus used to fraudulently obtain free long distance telephone service. However, the court did not allow the general question: "What did that conviction involve?" (JA 648). There is nothing in the record that would indicate that the court would not have permitted Segal's attorney to ask further, specific, directed questions of Clegg about his prior conviction, nor did counsel attempt to do so. Rather, counsel simply abandoned this entire line of questioning without pursuing the issue (JA 649). *Cf. United States* v. *Turcotte*, 515 F.2d 145, 151 (2d Cir. 1975).

POINT VIII

Zuber's Cross-Examination Of Government Witnesses Was Not Unduly Restricted.

Zuber asserts that the trial court improperly restricted the cross-examination of three prosecution witnesses, Acton, Clegg and Grant, thereby depriving him of his Sixth Amendment right of confrontation.

1. Acton

Zuber's cross-examination of the witness Acton was restricted when his attorneys first attempted to elicit from Acton, in the words of the indictment, whether he had conspired with Zuber to defraud the public through the sale of worthless securities (JA 378-80). However, on *recross*-examination, Zuber's attorneys were permitted, without restrictions of any kind, to ask *precisely* the same question that they were prohibited from asking on cross-examination (JA 415-16).

2. Clegg

Zuber raises the same claim with respect to his cross-examination of the witness Clegg (Zuber's Brief at 47, re: JA 625, 628-30). However, the record shows that testimony of Clegg's belief regarding any agreement to conspire unlawfully with Zuber *was* placed before the jury for its consideration. While Zuber's attorneys were not permitted to phrase their questions pertaining to an agreement between Clegg and Zuber within the precise language of the indictment (JA 627-28), Clegg's testimony as to this issue was effectively presented to the jury through a series of questions posed by the attorneys and the Court:

> Q. Let me ask it again. In your conversations with Mr. Zuber, was it ever your understanding that you and he had agreed to secure control of many

thousands of shares of stock never registered with the SEC?

Mr. Walker: Objection. It calls for the operation of this man's mind.

The Court: Did you ever agree in so many words with him to do that?

The Witness: Never.

Q. Did you ever agree with Mr. Zuber to establish an artificial market in the stock through manipulative devices?

Mr. Walker: Objection, Your Honor. This has been gone into.

The Court: Overruled.

Q. You may answer, sir. A. No.

* * * * *

Q. Did you ever have a conversation with Mr. Zuber in which he agreed to fraudulently obtain many hundreds of thousands of dollars at purchasers' and lenders' expense?

Mr. Walker: Objection.

The Court: Overruled.

A: No, I did not (JA 628-30).

3. Grant

Zuber argues that the cross-examination into Grant's motive and bias in testifying for the Government was unduly restricted (Zuber's Brief at 45-47). Zuber claims that, after Grant had "testified to facts tantamount to mail fraud by himself" (Zuber's Brief at 46), Zuber's attempted cross-examination as to the possibility of a Government promise not to prosecute in return for Grant's testimony was improperly prohibited by the trial court. The existence of this Grant-Government "deal" was not proved at trial, nor was there any evidence that it had ever occurred. The Government submits that such a bargain between itself and the defendant Grant never did exist, and consequently, any cross-examination as to such a deal is totally

without basis in fact. Furthermore, the defendant Zuber's attorney knew or should have known that such a deal did not exist. Under *Brady* v. *Maryland*, 373 U.S. 83 (1963), any exculpatory evidence, such as a Government-Grant deal, would have to be turned over to the defendants. Since no such agreement existed, no evidence of such an agreement was reported to Zuber or his co-defendants. Consequently, the attorneys for the defendant Zuber should have been aware that their cross-examination of Grant as to this non-existent "deal" was spurious. Clearly, the trial court acted correctly in refusing to allow this unfounded attack on Grant's credibility to continue.

Finally, the instant case was one involving fraud with respect to the sale of securities, not furs.

POINT IX

There Was No Surplusage In The Indictment Nor Was Zuber Thereby Denied A Fair Trial.

Zuber claims that the trial court erred in denying his motion under F.R. Crim. P. 7(d) to strike surplusage in the indictment; namely, at paragraph 4, that, "At all relevant times, the defendan[t] Edward Zuber . . . [was] . . . not regularly employed" (JA 8).

Even assuming that the portion is paragraph 4 pertaining to the defendant Zuber *is* surplusage, the defendant's argument must necessarily fail on several grounds. It is accepted that "The presence of surplusage is not fatal to the validity of an indictment. . . ." Wright, Federal Practice and Procedure—Criminal § 127 at p. 276 (1969); *United States* v. *Abel*, 258 F.2d 485, 501-02 (2d Cir. 1958), *aff'd*, 362 U.S. 217 (1960); *United States* v. *Strauss*, 283 F.2d 155, 159 (5th Cir. 1960); *Bary* v. *United States*, 292 F.2d 53, 56 (10th Cir. 1961); *United States* v. *Root*, 366

F.2d 377, 381 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967). It is also settled that the trial court has broad discretion in deciding whether or not to strike surplusage from the indictment, *United States* v. *Courtney*, 257 F.2d 944, 947 (2d Cir. 1958), *cert. denied*, 358 U.S. 929 (1959). *Dranow* v. *United States*, 307 F.2d 545, 558 (8th Cir. 1962); and motions to strike are seldom successful. *Wright, supra*, § 127. The Eighth Circuit has held that such motions "should be granted only where it is clear that the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter," *Dranow* v. *United States*, *supra*, 307 F.2d at 558. This Circuit concurs that an appellant must show that prejudice resulted from the trial court's denial of the motion to strike in order to warrant reversal. *United States* v. *Abel*, *supra;* see also *United States* v. *Bullock*, 451 F.2d 884, 888 (5th Cir. 1971). In the instant case, the allegation in question was relevant. The fact that the defendant Zuber was "not regularly employed" had bearing on Zuber's financial situation, state of mind, and availability to participate in the illicit scheme which required Zuber to fly across country to Los Angeles and Reno and to return to New York. The trial court found that the Government's proof had circumstantially established that Zuber was "not regularly employed" (JA 1124-25).

In no event is the statement that Zuber was not regularly employed prejudicial, given the present high rate of unemployment, and the fact that one juror and two alternates were themselves unemployed.* It is patently frivolous to argue, as Zuber does, that the inclusion of the phrase is "inflammatory." At worst, denial of Zuber's

* In this context it is noteworthy that the indictment avers Zuber to be not "regularly employed" rather than, as Zuber claims, not "gainfully employed." The difference in connotation, to the extent it is significant, is evident and reduces the likelihood that the jury may have looked upon Zuber with disrespect.

motion to strike was harmless. Fed. R. Crim. P. 52(a). See *United States* v. *Abel*, *supra*, where this Court wrote:

> "The most important of these errors complained of by the appellant is the refusal of the trial judge to grant two motions, one made prior to trial and one at the close of the Government's evidence, to strike as surplusage a recital in the tenth paragraph of both the first and second counts of the indictment that it was part of the conspiracy charged that Abel and his co-conspirators 'would engage in acts of sabotage against the United States.' . . . Even though we agree with the appellant that the reference to sabotage was surplusage, we are unable to see how that reference could have been prejudicial to his interests. As appellant points out, 'sabotage,' unlike the crime of 'espionage' charged in the indictment, connotes violence and destruction and hence might tend to inflame the jury; but there was no testimony in the case concerning sabotage or a conspiracy to commit sabotage, and the jury was carefully instructed by the trial judge that the indictment was not evidence and was not to be considered by them as evidence. Under these circumstances, we think that the failure of the trial judge to grant the motions to strike was such insubstantial error that it falls within the injunction of Rule 52(a) Fed. Rules Crim. Proc." (258 F.2d at 510-02).

Here, the trial court gave instructions that the indictment was not evidence, and that guilt or innocence must be based on the evidence alone (JA 1394, 1395-96). These instructions are curative of any possible prejudice that may be said to arise from inclusion of the challenged phrase. See *Lowther* v. *United States*, 455 F.2d 657, 666 (10th Cir.), *cert. denied*, 409 U.S. 857, 887 (1972); *United States* v. *Monroe*, 164 F.2d 471, 476-77 (2d Cir. 1947), *cert. denied*, 333 U.S. 828 (1948).

Finally, the acquittal of Zuber on all counts except Count 29 is hardly consonant with Zuber's present claim that the "not regularly employed" phrase was so inflammatory as to deny him a fair trial.

POINT X

Scardino's Remaining Claims As To Sufficiency Of The Evidence, Admission Of Hearsay Testimony And Segal's Post-Conspiracy Confession Are Without Merit.

Appellant Scardino asserts that the Government's evidence was insufficient as a matter of law on the conspiracy count and the substantive counts, that hearsay evidence should have been stricken, and that it was error as to Scardino to receive the extra-judicial post-conspiracy admission of the co-defendant Segal.

The evidence adduced at trial shows that Scardino was heavily involved in the conspiracy; this fact has been dealt with extensively within the context of Point II.

Scardino's contentions regarding the hearsay testimony of co-conspirators Acton, Clegg, Schiffman and Azzerone are also without merit. First, Scardino has failed to specify these statements and to indicate how they are prejudicial to his case. Secondly, even if these challenged statements are hearsay, they would be admissible under the accepted co-conspirator exception to the hearsay rule. *Lutwak* v. *United States*, 344 U.S. 604, 617 (1953); *Anderson* v. *United States*, 417 U.S. 211, 218 (1974); *United States* v. *Cafaro*, 455 F.2d 323, 326 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972).

Scardino's final claim, that it was error to admit Segal's post-conspiracy S.E.C. testimony, must also fail. It is

settled that declarations made by a conspirator after the conspiracy has ended when the declarant does not take the witness stand are not admissible against a co-conspirator. *Bruton* v. *United States, supra.* However, in order to warrant exclusion, such post-conspiracy statements must "powerfully" incriminate the silent co-defendant. *United States* v. *Wingate*, Dkt. No. 75-1065 (2d Cir. August 4, 1975), slip op. at 5354-55; *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971). See also *United States* v. *Lipowitz*, 407 F.2d 597, 603 (3d Cir.), *cert. denied*, 395 U.S. 946 (1969); *United States* v. *Ybarra*, 430 F.2d 1230, 1232 (9th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971); *United States* v. *Lyon*, 397 F2d 505, 509 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968); *United States* v. *Fellabaum*, 408 F.2d 220, 225 (7th Cir.), *cert. denied*, 396 U.S. 818, 858 (1969). This case did not involve the potential problems of *Bruton*, because Segal's S.E.C. testimony did not even slightly incriminate Scardino. Furthermore, Scardino did not object to the offer of Segal's S.E.C. testimony at trial, nor did Scardino request a limiting instruction on this point. Accordingly, Scardino's claim of error with respect to the introduction of Segal's S.E.C. testimony must be rejected as without merit.

POINT XI

There Was Abundant Evidence To Support Finkelstein's Conviction On Count 29, And The Conviction Was Not Contrary To Law.

Appellant Finkelstein contends there was insufficient evidence to convict him on Count 29 and that his conviction was contrary to law. Finkelstein asserts that there was a "total lack of participation" (Finkelstein's Brief at 8) on his part in the Grant transaction, that he gained nothing from the deal, that defendant Zuber was the primary nego-

tiator (Finkelstein's Brief at 7) and that Finkelstein "foolishly placed his signature" (Finkelstein's Brief at 5) on the option agreement, a fact which, Finkelstein believes, the prosecutor misstated to the jury in his summation (JA 1379-80). Finkelstein now asserts that "[a] truthful summation of the evidence * would have established that Howard's sole activity in the fur trade was simply to be present in Grant's office during the negotiation of the trade" (Finkelstein's Brief at 6). A review of the trial record plainly refutes Finkelstein's argument and shows that the jury was presented with ample evidence on which to convict Finkelstein of knowingly participating in the fraudulent New York fur transaction.

Michael Gardner testified that after Finkelstein and Zuber had returned to New York from the Reno "sit-down," Finkelstein told Gardner that "he wanted to buy a fur coat or fur coats for his wife." Finkelstein asked Gardner if "I knew a furrier that they might be able to deal with for stock as opposed to cash" (JA 800). Gardner referred Finkelstein and Zuber to Allen Grant and arranged for them to meet Grant to negotiate a fur-stock trade (JA 801, 913). Finkelstein met with Grant and was present at all subsequent negotiations (JA 915, 919, 923, 295). When Zuber told Grant of Pioneer's potential increase in value (JA 916-17), Finkelstein did not correct these false claims. Further, Finkelstein witnessed the option for Zuber to buy back the stock at ten dollars a share (JA 923). It was therefore proved beyond doubt that Finkelstein was no mere innocent bystander to the fraud. Moreover, in return for the 6900 shares of Pioneer stock transferred to him (JA

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* Finkelstein's attorney is suggesting facts on appeal which even Finkelstein's trial attorney did not argue to the jury. A careful reading of Mr. Newman's summation to the jury reveals no denial by Finkelstein of receiving any furs from the New York trade.

917, 296), Grant gave the defendants seven fur coats (GX 63A). Acton took three of the coats, giving one to Shepherd, one to Clegg, and retaining one for himself (JA 296, 598-599). Acton testified that the parties to the transaction understood at that time that the defendant Finkelstein "was to receive one of these coats from Mr. Grant" (JA 390).

The evidence shows that Finkelstein was the primary instigator of the transaction, that he was present at all the negotiations, that he silently approved of Zuber's inflated predictions of Pioneer's future earnings, and that it was the general understanding that Finkelstein was to receive a fur coat for his participation in the Grant deal. Viewing the evidence in a light most favorable to the Government, *United States* v. *Cirillo, supra,* there was ample basis to infer that Finkelstein actually did receive a fur coat. Accordingly, there was abundant evidence to support the jury's verdict convicting Finkelstein on Count 29.

POINT XII

Finkelstein Was Properly Convicted On Count 44.

Finkelstein contends that he was incorrectly convicted on Count 44. The testimony established that, as alleged in Count 44, a directed trade of 3500 shares of Pioneer stock took place through Economic Planning at Segal's behest, as part of a mail fraud scheme of which Finkelstein was charged to be a participant (JA 1050). As stated above, there was substantial proof that Finkelstein was a criminal participant in the mail fraud scheme by his presence and conduct at the Reno "sit down" to collect money for Segal and by Finkelstein's actions in fraudulently obtaining a fur coat in exchange for worthless Pioneer stock. In addition, the Government proved that Finkelstein had sold 10,000 shares of Pioneer directly to Karfunkel, misrepresenting that Pioneer was valuable and would increase in price (JA

1054-58; GX 61B, C, D). Thus, there was ample basis for the jury to infer that Finkelstein was a participant in the mail fraud scheme and to convict him of the substantive offense alleged in Count 44.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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) ss.:
COUNTY OF NEW YORK)

John S. Siffert being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 25th day of August 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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